S. HRG. 100-914

VISUAL ARTISTS RIGHTS ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 1619

A BILL TO AMEND THE COPYRIGHT LAW TO SECURE THE RIGHTS OF AUTHORS OF PICTORIAL, GRAPHIC, OR SCULPTURAL WORKS TO PREVENT THE DISTORTION, MUTILATION, OR OTHER ALTERATION OF SUCH WORKS, TO PROVIDE FOR RESALE ROYALTIES, AND FOR OTHER PURPOSES

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VISUAL ARTISTS RIGHTS ACT OF 1987

THURSDAY, DECEMBER 3, 1987

U.S. Senate,
Committee on the Judiciary,
Subcommittee on Patents, Copyrights and Trademarks,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 226, Dirksen Senate Office Building, Hon. Edward M. Kennedy (acting chairman of the subcommittee) presiding.

Also present: Senator Leahy.

Staff present: Edward H. Baxter, chief counsel and staff director; Cecilia Swensen, legislative aide/chief clerk; Elizabeth McFall, staff assistant; Carolyn Osolinik, chief counsel for Senator Kennedy; Kathy Kruse, counsel for Senator Kennedy; Melinda Nielson, chief clerk for Senator Kennedy; Randy Raider, minority chief counsel (Subcommittee on Patents, Copyrights and Trademarks); Matt Gerson, general counsel for Senator Leahy; Mamie Mills, counsel for Senator Heflin; Sam Gerdano, chief counsel for Senator Grassley, and Melissa Patack, minority counsel for Senator Grassley.

OPENING STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator Kennedy. We will come to order.

It had been the intention of the Senator from Arizona, Senator DeConcini, the chairman of the committee, to open these hearings this morning. He is necessarily absent, meeting with the Secretary of Defense on an important matter, so we will move ahead with the hearing.

I personally am very grateful to Senator DeConcini for setting up these hearings today, and thank him very much for the attention that he is giving to the legislation that we have before us. I will read Senator DeConcini's very short statement:

> I am pleased to be able to schedule the hearing this morning on S. 1619, the Visual Arts Rights Act of 1987. Senator Kennedy has always been extremely helpful and accommodating to me in my years in the Senate, and I am grateful I am able to reciprocate.
>
> I believe the subcommittee has assembled a distinguished and knowledgeable group of witnesses today to be able to educate the committee to the concerns on both sides of this issue. I regret very much I will be unable to attend the hearing this morning because of a conflicting schedule on important matters, including two amendments of my own in the Appropriations Committee. I look forward to reading the hearing record, and want to thank the witnesses very much for their participation.

This legislation presents us with an opportunity at long last to incorporate into our laws the recognition of the critical role that the creative arts have in our society.

Artists in America, as in every other country and civilization, have been the recorders and preservers of the national spirit. The creative arts are an expression of the character of a country. They mirror its accomplishments, warn of its failings, and anticipate its future.

As Katherine Anne Porter wrote in 1940:

> The arts live continuously. * * * They outlive governments and creeds and societies, even the very civilizations that produced them * * * They are what we find again when the ruins are cleared away.

I have served on the Committees on Labor and Human Resources and Judiciary from my earliest days in the Senate, and I have had the opportunity to assess the role of the creative arts in America and the Federal role in support of the visual arts. I am convinced that the legal protections for visual artists are insufficient to meet their legitimate needs and interests.

I have introduced S. 1619, with Senator Kasten, in an effort to strengthen the protections for visual artists and for our cultural heritage, and to enhance knowledge and awareness of the importance of this issue. A year ago the subcommittee held a field hearing in Cooper Union in New York, and since that time we have worked with many people in many segments of the arts community to develop and improve the technical application of the concepts embodied in the bill—the copyright notice, the moral rights, the resale royalties.

The bill provides full copyright protection to all works of fine art without any requirement that a copyright notice be affixed to the work. Elimination of the notice requirement will guarantee the artists the copyright protection they need; it will deter violators; and it will encourage artists to register their works more frequently. Artists are entitled to sign their works, but the Government does not have to sign them too. The copyright symbol is just that—a symbol of Government protection—but it does not have to become a blemish on a brilliant work of art.

The second component of the legislation recognizes the so-called moral rights of visual artists, which include the right to be recognized as the creator or a work of art and the right to prevent unauthorized alteration, mutilation or destruction of the work at the hand of a future owner. Those who tamper in such ways with works of art will be subject to the full civil penalties available under copyright laws.

Finally, the bill alleviates the serious problem of economic exploitation of visual artists by permitting them to share in the appreciating commercial value of their work. The concept of royalties enables artists in the performing and literary arts to benefit from such increasing value. The bill will provide visual artists with a comparable royalty when their works are resold.

It is fair to say that resale royalties are the most controversial provisions in this legislation, but it is not a novel concept. It has long been applied for the benefit of other creative artists, and the visual artists deserve such protection too.

Although many countries around the world already guarantee these three basic rights, the United States has been slow to embrace them. It is time for Congress to act and to acknowledge America's responsibility to its creative artists.

I will include the rest of my statement in the record.

[The prepared statement of Senator Kennedy, along with the text of S. 1619, follows:]

PREPARED STATEMENT OF SENATOR EDWARD M. KENNEDY

I would like to thank Chairman DeConcini for convening this hearing today to consider S. 1619, the Visual Artists Rights Act.

This legislation presents us with the opportunity, at long last, to incorporate into our laws the recognition of the critical role that the creative arts have in our society.

Artists in America, as in every other country and civilization, have been the recorders and preservers of the national spirit. The creative arts are an expression of the character of a country—they mirror its accomplishments, warn of its failings, and anticipate its future. As Katherine Anne Porter wrote in 1940:

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A year ago, the subcommittee held a field hearing in Cooper Union in New York. Since that time, we have worked with many people in many segments of the arts community to develop and improve the technical application of the concepts embodied in the bill—copyright notice, moral rights, and resale royalties.

The bill provides full copyright protection to all works of fine art without any requirement that a copyright notice be affixed to the work. Elimination of the notice requirement will guarantee artists the copyright protection they need; it will deter violators; and it will encourage artists to register their works more frequently. Artists are entitled to sign their works, but the government does not have to sign them too. The copyright symbol is just that—a symbol of government protection, but it does not have to become a blemish on a brilliant work of art.

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Finally, the bill alleviates the serious problem of economic exploitation of visual artists by permitting them to share in the appreciating commercial value of their work. The concept of royalties enables artists in the performing and literary arts to benefit from such increasing value. The bill will provide visual artists with a comparable royalty when their works are resold.

It is fair to say that resale royalties are the most controversial provision in this legislation. But it is not a novel concept; it has long been applied for the benefit of other creative artists, and visual artists deserve such protection too.

Although many other countries around the world already guarantee these three basic rights, the United States has been slow to embrace any of them. It is time for Congress to act and to acknowledge America's responsibility to its creative artists.

The Federal Government supports the arts financially, through the National Endowment for the Arts. However, our other laws do not adequately protect the legal status of visual artists or provide an adequate environment to encourage their creative works.

I also want to make clear, with respect to a related issue, that I support U.S. adherence to the Berne Convention. I agree with Senator Leahy that moral rights legislation is not necessary to bring the United States into compliance with the Berne Convention.

However, the issues involved in Senator Leahy's bill on the Berne Convention are distinct from those in the Visual Artists Rights Act. The Convention applies to a broad range of literary and artistic works. My bill is a specific response to problems faced by a limited group—visual artists.

I commend the Chairman DeConcini's leadership on these issues and I look forward to working with him and Senator Leahy on both the Berne Convention legislation and the Visual Artists Rights Act.

I thank each of the witnesses for coming today—for their important role in this debate, and for their contribution to the Senate's understanding of this important issue.

VISUAL ARTISTS RIGHTS ACT

I. GOALS

The bill improves copyright protections for visual artists. It recognizes the implicit originality of individual works of fine art, the public benefit of encouraging a creative environment for artists to work, and the national responsibility to enrich and enliven our cultural heritage.

II. SYNOPSIS

The bill has three major components:

Notice: for pictorial, graphic or sculptural works, delete the requirement in current copyright law that a copyright notice appear on all works for which a copyright is claimed.

Rights: prohibits intentional distortion, mutilation, or destruction of works of art. Allows an artist to claim authorship of his work, or disclaim authorship if the work has been distorted. Remedy is the same as for other infringements of copyright, but there are no criminal sanctions. A work of art which is part of a building is not covered, unless the artist expressly reserves his rights at the time of commission.

Resale royalties: requires payment to the artist of 7% of the difference between the purchase price and the selling price of a work of art which is resold. Royalty payments are applicable to sales in excess of $1,000 and when the value of the work increases by at least 150%—during the lifetime of the artist and within 50 years of his death. Artists seeking royalties must register on a one time basis as an artist with the Copyright Office. When an artist is deceased, royalties would be paid to the artist's estate.

III.

The bill applies to:

Original works of fine art, e.g. paintings, sculpture, pictorial works, including serigraphs and other work done in limited edition series.

Works of fine art done under commission would be covered since copyright does not usually transfer with the actual work.

Exclusions from the bill:

"Work for hire" pieces are not covered since authors in these cases transfer the copyright along with the work.

Work attached to buildings is not covered unless the artist expressly reserves his right in contract at the time of execution.

IV. SUPPORT FOR THE BILL

American Council on the Arts, Artists Equity, Graphic Artists Guild, Boston Visual Artists Union, Visual Artists and Galleries Association, Bay Area Lawyers for the Arts, New York Volunteer Lawyers for the Arts, National Association of Local Arts Agencies, Business Committee for the Arts, New York Artists Equity, Independent Committee on Arts Policy.

II

100TH CONGRESS
1ST SESSION

S. 1619

To amend the copyright law to secure the rights of authors of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 6 (legislative day, AUGUST 5), 1987

Mr. KENNEDY (for himself and Mr. KASTEN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend the copyright law to secure the rights of authors of pictorial, graphic, or sculptural works to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Visual Artists Rights Act of 1987".

SEC. 2. Section 101 of title 17, United States Code, is amended by—

(1) inserting between the paragraph defining "pictorial works" and the paragraph defining "pseudonymous work", the following:

" 'Price' as used herein, is the aggregate of all installments paid in cash or in-kind for a work.";

(2) inserting between the paragraph defining "publicly" and the paragraph defining "sound recordings", the following:

" 'Sale' and 'resale' as used herein, shall include transactions essentially equivalent to a sale including long-term lease, lease-purchase arrangements, and the like."; and

(3) inserting between the paragraph defining "widow" and "widower" and the paragraph defining "work of the United States Government", the following:

"A 'work of fine art' is a pictorial, graphic or sculptural work of recognized stature. In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art. Evidence of commercial exploitation of a work as a whole or of particular copies, does not preclude a finding that the work is a work of fine art.".

SEC. 3. Section 106 of title 17, United States Code, is amended by adding "(a)" before "Subject" at the beginning of the section and adding at the end thereof the following:

"(b)(1) Independent of the copyright owner's exclusive right provided in subsection (a), the author of a pictorial, graphic, or sculptural work of fine art, whether or not he is the copyright owner, shall have the right during his life to claim authorship of any of his works which are publicly displayed or to disclaim authorship of any of his works which are publicly displayed because of any distortion, mutilation, or other alteration thereof.

"(2) Upon the death of an author, his estate shall have the exclusive right, up to 50 years after his death, to exercise the rights granted to the author in paragraph (1) of this subsection.

"(c)(1) Subject to the limitation in section 113(d), the significant or substantial distortion, mutilation, or other alteration to a pictorial, graphic, or sculptural work, which is publicly displayed, caused by an intentional act or by gross negligence is a violation of the exclusive rights of the copyright owner where the author of the work is the copyright owner. Where the author is not the copyright owner, he shall still have the exclusive right during his lifetime, and the estate of such author shall have the exclusive right for up to 50 years after the death of such author, to assert infringement of the copyright, as described in this subsection.

"(2) Subject to the limitations in section 113(d), the destruction, by an intentional act or gross negligence, of a work of fine art is a violation of the exclusive rights of the author of the work. Where the author is not the copyright owner he shall still have the exclusive right during his lifetime, and the estate of such author shall have the exclusive right for up to 50 years after the death of such author, to assert infringement of the copyright, as described in this subsection.

"(d)(1) Whenever a pictorial, graphic, or sculptural work is sold, the seller shall pay a royalty to the author. Where the author is deceased at the time of the sale, and the sale occurs within fifty years after the death of the author, such royalty shall be paid to the estate of the author. Such royalty shall be equal to 7 percent of the difference between the seller's purchase price and the amount the seller receives in exchange for the work. The right of the author to receive this royalty may not be waived. An author may assign the right to collect this royalty payment, provided however, such assignment shall not have the effect of creating a waiver prohibited by this subsection. Failure of a seller to pay the author a royalty due under this section shall constitute an infringement of the copyright.

"(2) Paragraph (1) shall not apply to the following:

"(A) The resale of a work for a gross sales price of less than $1,000, or in exchange for property with a fair market value of less than $1,000.

"(B) The resale of a work where the seller receives less than 150 percent of the purchase price paid by the purchaser.

"(C) Any author who has not registered as an author with the Copyright Office prior to that resale.

"(e) The Register of Copyrights is directed to establish registration procedures, for subsection (d)(2)(C), by regulation.

"(f) All sales or other transfers of pictorial, graphic, or sculptural works by registered authors for which a royalty is due must be registered by the seller or transferor with the Copyright Office. The Register of Copyrights is directed to establish such registration procedures by regulation. Such registration may be limited to the name of the artist, the title of the work, name and address of the seller, the date of sale, and the fair market value of any property received in exchange for the work.

"(g) Failure of a transferor or a seller of a pictorial, graphic, or sculptural work by a registered author to register such transfer or sale with the Copyright Office within 90 days shall constitute an infringement of copyright and shall subject the seller to a penalty equal to treble the amount of the royalty owed.".

SEC. 4. Section 113 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d)(1) If a pictorial, graphic, or sculptural work of fine art cannot be removed from a building without distortion, mutilation, or other alteration of such work, the author's rights under subsections (b) and (c) of section 106, unless expressly reserved by an instrument in writing signed by the owner of such building and the author of the work of fine art and properly recorded, in the applicable State real property registry for such building, prior to the installation of such work, shall be deemed waived. Such instrument, if recorded, shall be binding on subsequent owners of such building.

"(2) If the owner of a building wishes to remove a pictorial, graphic, or sculptural work of fine art which is a part of such building but which can be removed from the building without substantial harm to such work, the author's rights under subsections (b) and (c) of section 106 shall apply unless the owner has diligently attempted without success to notify the author, or, if the author is deceased, his heir, legatee, or personal representative, in writing of his intended action affecting the work of fine art, or unless he did provide notice and that person failed within ninety days either to remove the work or to pay for its removal. If such work is removed at the expense of the author, his heir, legatee, or personal representative, title to such work shall be deemed to be in such person.".

SEC. 5. Section 401 of title 17, United States Code, is amended by adding at the end thereof the following:

"(d) The provisions of this section shall not apply to pictorial, graphic, or sculptural works.".

SEC. 6. The criminal penalties provided by section 506 of title 17, United States Code, shall not apply to infringement of the rights created in section 106 (b), (c), and (d) of such title.

SEC. 7. There are hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEC. 8. Nothing in this Act, or the amendments made by this Act, shall be construed to apply to a work made for hire as defined in section 101 of title 17, United States Code.

Senator **Kennedy**. Before we call our first witness, I have a prepared statement of Senator Grassley to be inserted in the record at this time.

[The prepared statement of Senator Grassley follows:]

Prepared Statement of Hon. Charles E. Grassley, a U.S. Senator From the State of Iowa

I would like to thank Senator DeConcini for holding this hearing.

The issue of artists' entitlement to the protection of the copyright laws is an important one to artists, as well as to those who buy and sell artwork.

While I have not yet taken a position of this legislation, I am very interested to learn more about the issues the bill addresses. I understand that artists who cannot put a copyright mark on their painting, sculpture or other visual art would, nevertheless, like to be able to avail themselves of the protection of the copyright laws. In addition, artists seek protection of the copyright laws. In addition, artists seek protection against the alteration of their work and recourse in the event of any destruction of their work. They also would like to share in the value appreciation of their work which those who deal in art enjoy.

I am aware of the concerns raised by the creators of artwork. In our Nation we do place a high value on the contribution creativity, in the form of art, makes to our society. And I am mindful of the fact that many Western nations provide the protections American artists seek in their own country.

I am interested in hearing from the witnesses as to their views on the issues in general and this legislation in particular.

Senator **Kennedy**. I want to welcome to our committee my friend and prime sponsor and mover of this legislation, the Senator from Wisconsin, Senator Kasten, and ask him to make what comments he wishes to make.

STATEMENT OF HON. ROBERT W. KASTEN, JR., A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator **Kasten**. Mr. Chairman, thank you very much. I appreciate, first of all, the opportunity to testify today in support of S. 1619, the Visual Artists Rights Act of 1987. First of all, I commend you, Senator, and other members of the committee not only for holding the hearings but for introducing this legislation, and I am proud to be a cosponsor.

The Constitution of 1787 declared the following:

> The Congress shall have the power * * * to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

That was 200 years ago. But today, 200 years later, the rights of one of our Nation's most important groups of inventors remain at risk. It is time Congress exercised its power to promote and secure the rights of America's visual artists.

Mr. Chairman, we spent weeks on the Senate floor debating the omnibus trade bill. A very important part of that bill was the protection of U.S. intellectual property rights abroad. Can we in good conscience fail to protect the rights of visual artists right here at home?

This is an important and necessary bill. It would be impossible today to argue against the protections already afforded to literary artists and composers. It is, therefore, inconceivable to me that one could argue against extending these protections to the visual arts. When these works are altered or destroyed, they are gone—forever. We have a duty to protect them.

Today there is no guarantee that the owner of a fine work of art will protect the integrity of that art. We have all heard the horror stories about paint being removed from sculpture, murals painted over, paintings changed and altered. We have to recommit ourselves to the fundamental premise that even when an artist has sold his work he retains the moral and legal right to preserve the integrity of that work.

I would also note that in correspondence which you received as part of the hearings held last year, the hearing record discussed a different but, I believe, related concept. Theodore Bikel wrote, and I quote from his letter of October 24, 1986:

> In one regard I wish the bill had gone further," he said. If you own an artist's painting and decide to donate it to a museum, library or hospital, then you can use its full market value as a tax deduction. Yet should the artist himself donate the work, then he can deduct only the cost of the canvas, paint and frame.

I ask unanimous consent that the entire letter be included as part of my testimony.

Senator **Kennedy**. It will be so included.

[Above-mentioned letter follows:]

October 24, 1986.

Hon. Edward M. Kennedy,
U.S. Senate,
Washington, DC.

Dear Ted: Thank you for writing to me about the artists copyright bill.

As usual, you are right on target. Needless to say, you have my full support on the bill whose passage will go a long way toward righting a wrong which has plagued the visual artists for a long time now. We really are, at times, a dense people! Even when confronted with an obvious injustice, so many tend to fence-sit because "they don't know enough about it". Thank you for once again reminding the Congress of its duty. Artists are a small group of people whose vote, statistically, is hardly worth a damn. But we owe them our attention nonetheless.

In one regard I wish the bill had gone further. If you own an artist's painting and decided to donate it to a museum, library or hospital, then you can use its full market value as a tax deduction. Yet should the artist himself donate the work then he can deduct only the cost of the canvas, paint and frame. This situation is compounded by a further injustice: Should the artist die then all the unsold paintings in his/her possession are assessed full market value for the purpose of estate taxes and the artist's family may have to pay a heavy price for the dead artist's popularity. A double whammy, if ever there was one. The new tax law probably won't change this at all; contributions are still allowable as far as I read the regulations. Well, we shall have to deal with this also, if not by amending this bill then at a later date.

I send you my best wishes,

Theodore Bikel.

Senator **Kasten**. I realize that this legislation would come under the jurisdiction of the Finance Committee rather than the Judiciary Committee, but I hope that I can work with you and other members of the subcommittee as I introduce legislation to remedy this inequity as well.

But to conclude, Mr. Chairman, S. 1619 is a good bill. It has its controversial side. Some have expressed concern over the resale royalty provision. I know that the Senator from Massachusetts is aware of these concerns and has requested this hearing, in part, to provide a forum to address them. I am anxious and happy to work with you, Senator, in any way we can in order to deal with the controversy about this particular portion of the bill.

I appreciate the time that you are taking to hold this hearing, and I hope that the bill will be reported out soon so that we can see this legislation signed into law in the 100th Congress. I thank the members for their time and attention. I believe strongly that we have to work to recognize the importance of protecting our Nation's creative talents.

Senator **Kennedy**. Thank you very much, Senator Kasten, for your comments.

I think you are aware, as I am aware, that the assault on the creative arts—I know Congressman Markey, who we are going to hear from next is aware—comes from a variety of different areas. This problem is something I know you have been concerned about, as I have been along with many other members of both the Judiciary Committee, which has copyright jurisdiction, as well as the Labor and Human Resource Committee, which has been the source for authorizing the support for the creative arts. We have seen other areas of potential encumbrances on the creative genius of American artists, and I think it is important that we try and do what can be done in order to preserve that very special quality which is so much a part of our culture and tradition.

I welcome in your statement your comments about the charitable contributions of works by artists. As you remember well, we joined together to try and address that issue previously, unsuccessfully. But from that effort I think there is a greater knowledge and understanding of the very simple point that you brought out today, which has been regrettably overlooked time and time again. I certainly hope that I will be able to join you in that effort, and hopefully we will be more successful in the future than we have in the past.

We want to take special note that Senator Kasten is a proud father of a week, and so his willingness in these early morning hours to look as clear-eyed as he is, is a special accommodation.

Senator **Kasten**. Despite the bags under my eyes.

Senator **Kennedy**. Thank you very much, Senator Kasten. We will look forward to working with you.

Senator **Kasten**. Thank you very much.

Senator **Kennedy**. We welcome my colleague from Massachusetts, who has served a number of years in the House of Representatives and also in our own legislature in Massachusetts and who has been a real leader in many areas of public policy, including the issue of arms control and the whole area of electronics and telecommunications. He also has a very special interest and commitment in the area of the creative arts. We are very glad to have Congressman Markey here this morning. He is a real leader in the House of Representatives in this endeavor.

Ed, we are glad to have you here.

STATEMENT OF HON. EDWARD J. MARKEY, A U.S. REPRESENTATIVE FROM THE STATE OF MASSACHUSETTS

Mr. **Markey**. Thank you, Senator, very, very, much. I thank you for the opportunity of testifying on behalf of the legislation that you and Senator Kasten have introduced over here. I have introduced identical legislation in the House of Representatives, and we are going to try as best we can to move them along on parallel tracks because of the importance of giving this kind of protection to artists.

The purpose of the bill is to recognize legally that painters and sculptors, just like playwrights, novelists, composers and musical performers, are creative authors whose work deserves legal protection. By amending copyright law with respect to copyright notice, moral rights, and resale royalties, it seeks to protect the integrity of the artistic work and the economic rights of the artist.

One vitally needed provision of this bill is the codification of moral rights, recognizing that the artist has a legitimate interest in the intellectual property embodied in his work. This bill gives the artist civil copyright protection for the integrity of his work.

Let me give one illustration: Last year, two owners of an Australian mail-order firm known as Subdivision Art bought a 1959 Picasso linocut print entitled "Trois Femmes." Their purpose was to cut it into 500 pieces, each 1 square inch, which would sell for $135 apiece. They ran an ad which read, "Yes, your own beautiful framed Picasso piece, in the most original and exciting offer in the history of Australian art. And you can own a piece of the work yourself." $135 for 1 square inch of a Picasso, cut up. One of the entrepreneurs, David Robertson, was quoted as saying, "If this thing takes off, we may buy other masters as well and give them the chop."

Well, we don't need profiteers roaming the world giving artistic masterpieces the chop. The legislation introduced by you, Senator, and Senator Kasten, and by me over in the House, would give an artist the right to bring a civil claim for the intentional destruction or mutilation of his work. Our legislation would address a gap in American law by recognizing that, as original expressions of the artist's creativity, works of visual fine art embody intellectual property which can and should be protected by copyright law.

But protection of the integrity of the work is not the only area in which visual artists are inadequately protected. They also need the right to participate economically in the success of the work. Novelists collect royalties on their books. Composers get royalties from their pieces. Singers get royalties from their recordings. Painters and sculptors should get royalties, as well, when their works are successful.

The resale royalty is perhaps the most contentious provision of the bill because it involves money. Let's be frank. There is a lot of money being made in the art world. The problem is that too little of it ever gets to the artist.

A work of art is not a utilitarian object like a toaster. It is an intellectual work like a song, a novel or a poem. We should not pretend that all connection between the artist and his work is severed the first time the work is sold.

A painting does not sell for $54 million because its canvas and paint are unusually valuable. It is valued highly because it embodies the creative effort of a particular artist. Nonetheless, in today's art world that $54 million breaks out to $49 million for the seller, $4.9 million for the auction house, and zero for the artist—the person who created the work and the reason why it is so valuable. That same formula applies to most successful art today.

The Visual Arts Rights Act says that if the seller of a work of art worth more than $1,000 is making a profit of 50 percent or more on its resale, the artist should get a royalty of 7 percent of the profit.

The argument will be made that giving the artist a 7-percent royalty on large resale profits of his work somehow will ultimately hurt the artist by wrecking the art market in America, yet American art has managed to survive despite the 10 percent commissions from consignors and the 10 percent premiums from buyers that art dealers charge. The arithmetic of the resale royalty is simple: If the seller, who didn't create the work, is making 50-percent profit on it; if the dealer, who didn't create the work, is getting a 10-percent commission on it; if the Government, which didn't create the work, is getting an 8½-percent cut on it; why shouldn't the artist, who did create the work, get a 7-percent cut of the profit of his own work, particularly since the artist is in fact the reason why the paint and the canvas is worth thousands or millions of dollars?

By channeling some of the profits made on art back to the people who create art, and by giving artists some protection for the integrity of their work, the Visual Artists' Rights Act will help encourage one of the most important elements of our society. It is not just a matter of fairness to artists; it is a matter of encouraging and supporting a vital part of the American civilization.

I want to congratulate you for holding these hearings. We plan to conduct similar hearings over in the House, and I hope that in an expeditious fashion we can see this type of legislation reported out.

Senator KENNEDY. Thank you, Congressman Markey. This legislation establishes new ground in the area of intellectual property and moral rights. It is extremely important, I believe. I think your presentation has covered the waterfront very well, both in terms of summarizing its essential aspects and making the case in support for it.

I have just been notified that the House is in the midst of a rollcall vote, so we will excuse you. Thank you very much, and we will look forward to working very closely with you. Thank you very, very much.

Mr. MARKEY. Thank you.

Senator KENNEDY. Our first witness, the Register of Copyrights, Ralph Oman. He is a former counsel to Senator Mathias in the Copyright Subcommittee. We look forward to his testimony.

The issue of the creative artists—the national responsibility to provide them with adequate and appropriate legal partners—is something which we are addressing increasingly here in the Congress. It is entirely appropriate that we do so.

We were, I think in this hearing room not long ago, talking about source licensing, and at that time one of the prime considerations in evaluating the impact of that legislation was in the area of the creative artists, the composers, and whether it was going to be supportive of encouraging creative composition of music or whether it would discourage that experession and, further, whether the existing system would be more supportive for creative composers. You were enormously helpful to the committee at that time in assessing the impact of that legislation, and we welcome you back to the committee again to speak to this legislation.

STATEMENT OF RALPH OMAN, REGISTER OF COPYRIGHTS

Mr. OMAN. Thank you very much, Mr. Chairman. It is always a pleasure to be here, and I appreciate the opportunity to testify on S. 1619.

The Copyright Office has always existed to encourage creativity in the United States, and I applaud your effort here to give artists a fair shake in the marketplace. You have long been recognized as a champion of the men and women who create artistic works in this country, and this bill is true to that long tradition.

As you know, the bill would grant visual artists new Federal rights under the Copyright Act: a right to claim or disclaim authorship; a right to prevent distortion, mutilation or other alteration of their works; and a right to receive royalties for their works when they are resold. The first two are known in the civil law countries as the moral right or the "droit moral," and the latter as the resale royalty right or the "droit de suite," respectively. Many foreign countries have for many years granted both of these rights to artists and sculptors.

Visual art works present special challenges in copyright law because of the nature of their creation and the nature of their dissemination. Neither mass-produced nor mass-distributed, they often exist only in a single copy. After the sale of that unique work, the first sale doctrine of the copyright law has prevented artists from sharing in the increased value of their works. Only visual artists suffer this hardship. As Mr. Markey pointed out, composers, playwrights, choreographers, all can share in the increased value of their work down the road.

S. 1619 has been carefully crafted with an eye to the sensitivities of the marketplace and the interests of the artistic community. For the first time in Federal copyright history, it would expressly give visual artists moral rights. They already exist in the United States to a limited degree under the common law, under the fair trade laws, and under the Federal trademark law, but this is the first time they would be actually expressly granted under the U.S. copyright law.

S. 1619 would also create special Federal rights for works of fine art, which the bill defines as pictorial, graphic or sculptural works of "recognized stature." These are the rights to claim or disclaim authorship and the right to object to the destruction of the work. The bill allows experts—artists, historians, curators and others knowledgeable in the field of fine art—to establish what exactly is mean by "recognized stature."

Traditionally, the U.S. copyright law has not given additional rights to a work based on its perceived quality. The proposed distinction based on aesthetics has preservation and national cultural interests as its raison d'etre. It may be in the national interest to treat works of greater artistic merit with greater respect, but the copyright law has traditionally relied on the marketplace to control the rewards earned by the artists.

The bill would also eliminate the notice of copyright requirement in the case of pictorial, graphic and sculptural works, which is a very broad category of works that includes not only works of fine arts but also stuffed toys and board games. The notice requirement, the familiar "C" in a circle, has long been part of the U.S. copyright law.

I wonder if we should set aside the notice requirement for only a single category of works? It might be preferable to consider elimination of the notice for all works as part of the Berne implementing legislation, rather than opt for the piecemeal approach. In fact, all three of the Berne implementing bills that are now before Congress strike the notice requirement across the board.

S. 1619 assigns the Copyright——

Senator KENNEDY. Do you support that?

Mr. OMAN. We have, in fact, supported the elimination of the notice requirement——

Senator KENNEDY. For all artists?

Mr. OMAN [continuing]. And we feel that if the Berne implementing legislation is adopted, that will be a part of the final bill.

S. 1619 assigns the Copyright Office two registration functions: First, in order to be eligible for resale royalties, an artist must register his name or her name with the Copyright Office. Second, the seller must register with the Copyright Office all transfers of the work subject to the resale royalty.

The specifics of the registration procedures are to be determined by the Copyright Office regulations, and no explicit fee is designated for providing these services. The Register of Copyrights, under your formulation, would set the fee to recover costs. I would ask you that you make it clear in the legislative history that I have the authority to charge a reasonable fee, so I can make sure that the registration system pays its own way and is not an added burden to the taxpayer.

Senator KENNEDY. I think that makes a good deal of sense. As I understand it, the CBO has submitted the evaluation of the bill and estimates a net cost to the Government of approximately $60,000 annually. I think that is the figure, but it certainly would seem advisable to me that a fee schedule be worked out to offset the cost as a de minimis factor. Since we are in that kind of range, it would certainly seem sensible to make that adjustment in the legislation. I think it is a useful suggestion. We will do that.

Mr. OMAN. Let me just make one more point in closing. I know you will hear from other witnesses on this point, but I think we have to be very careful in reordering relationships in the art world, especially the relationship between artists and gallery owners. We can't look at works of art as we would look at a box of cornflakes in the supermarket, or as toasters, as Mr. Markey said. The gallery owner has a very personal relationship with the artist, and we don't want to burst into that relationship with pistols blazing. I think that S. 1617 does in fact tread lightly in this very sensitive area, but I would want to hear from the experts who will follow me before making a final judgment.

Another brief point: For reasons of strategy, you might want to sever the moral rights provision from the rest of the bill and rely instead on the Berne implementing legislation. This might make it easier to move forward with the "droit de suite" and reserve the moral rights provision for the implementing legislation on Berne.

I am intrigued, in fact, with the concept of a resale royalty right, but I do have some questions. I wonder if artists in the Federal Republic of Germany, for instance, are better off with the "droit de suite" than are artists in the United States. In California I know that artists strongly supported the "droit de suite" law, while the gallery owners thought it would do them great harm. I question what actually has happened. I hope we find out in the course of the morning.

Would a uniform Federal resale royalty solve any problems with the California experience? Would a national resale royalty right, on the other hand, make the United States a less attractive place for international art markets? Would Montreal or Toronto or Bermuda replace New York as the premier art sale venue? Would a worldwide solution to the problem under the auspices of, for instance, the World Intellectual Property Organization, be a better solution in the long term?

These are some questions that occur, and I trust you will get answers from the witnesses this morning. The Copyright Office would be pleased to work with you and to provide technical advice as the bill moves through the legislative process, and I would be pleased to submit a followup written statement after I have had the chance to read the testimony of the other witnesses.

We are at your service, Mr. Chairman. Thank you for the opportunity.

[The prepared statement of Mr. Oman and subsequently submitted material for the record follows:]

STATEMENT OF RALPH OMAN

S. 1619, the Visual Artists Rights Act of 1987 would grant visual artists new federal rights under the Copyright Act which are known in civil law countries as moral rights and the resale royalty right, or "droit de suite."

For visual artworks, it would establish for the first time a federal right in the nature of moral rights. S. 1619 would in addition create federal rights for works of fine art, which are defined as pictorial, graphic, or sculptural works of "recognized stature."

Traditionally, the United States copyright law has not given additional rights to a work based on its quality. The proposed distinction based on aesthetics has preservation and national cultural interests as the raison d'etre; it may be in the national interest to treat works of greater aesthetic merit with greater respect. In copyright law, however, the marketplace has traditionally controlled the benefits accorded works of differing quality.

S. 1619 assigns the Copyright Office two registration functions. I would ask that the legislative history make clear I have the authority to charge a reasonable fee for the registration services.

Congress might wish to sever the moral rights from resale royalty provisions of S. 1619. The Copyright Office believes that it would be better to consider action on the moral rights provisions in conjunction with United States adherence to Berne, which cuts across all classes of authors and all categories of works.

We have no principled objection to the concept of resale royalty rights. We do, however, have some questions.

STATEMENT OF RALPH OMAN
REGISTER OF COPYRIGHTS
BEFORE THE
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS
SENATE COMMITTEE ON THE JUDICIARY
100th CONGRESS, FIRST SESSION

December 3, 1987

Mr. Chairman and members of the Subcommittee. I am Ralph Oman, Register of Copyrights in the Library of Congress. Thank you for the opportunity to appear and present views on S. 1619, the Visual Artists Rights Act of 1987 (introduced by Senator Kennedy).

The bill would grant visual artists new federal rights under the Copyright Act: 1) a right to claim or disclaim authorship; a right to prevent distortion, mutilation, and other alteration of their works, and 2) a right to receive royalties when their works are resold. Known in civil law countries as moral rights, or "droit moral," and resale royalty rights, or "droit de suite," respectively, these rights have long been granted to authors in various forms in many foreign countries.

For this special category of creator-visual artists, the men and women who paint, sculpture and draw this legislative proposal symbolizes a new direction for American copyright law.

Congress has three proposals before it for United States adherence to the Berne Convention for the Protection of Literary and Artistic Works. The most recent version of Berne (Paris, 1971) would require adherents to recognize moral rights in some form. Congress is reflecting on the nature of the Berne obligation with respect to moral rights. The Kennedy bill affords a new opportunity to view the issue as it applies to only one category of works, that of the visual arts.

A comparison of S. 1619 with the provisions of the Berne Convention reveals that the bill's moral rights provisions are both broader and narrower. For example, under Article 6*bis* of the Convention, all categories of works are protected. The Kennedy bill would protect only pictorial, graphic, and sculptural works. (Hereafter, interchangeable with visual artworks.) Taken literally, the bill would permit the creators of publicly displayed works of fine art to disclaim authorship where any alteration of the work was made. Berne allows the author to object to changes only when they prejudice the artist's honor or reputation.

Although the expert State Department Ad Hoc Committee on the Berne Convention concluded that the United States need adopt no specific moral rights legislation to adhere to Berne, some might argue that federal statutory rights under the Copyright Act may preempt any state statutory or common law moral rights relating to all kinds of works. The Subcommittee may wish to amend section 301 of the Copyright Act to make clear that existing state moral rights protection is not preempted by the new federal right.

Background of Visual Artists Rights Legislation

Legislative efforts to create federal moral rights protection for visual artists predate the present Berne initiatives. Visual artworks present special challenges in copyright law because of the nature of their creation and dissemination. In many cases, they are neither mass produced nor mass distributed; a work may exist only in a single copy. After the sale of that unique work, the first sale doctrine of the copyright law has prevented artists from sharing directly in the increased value of their works. In many cases, the lack of opportunity for visual artists to share directly in the future value of their works sets them apart from authors of musical works, dramas, and choreography.

Increased legal protection for visual artists has its own external impetus. The steadily increasing value of art in the market place has been exemplified recently by the history-making sales prices of fine art.

S. 1619 has been carefully crafted with an eye to the sensitivities of the marketplace and the interests of the artistic community. It responds to national preservation interests as well as the need of the creator to have a continuing relationship with his creation. Hearings were held at Cooper Union in New York last year on S. 2796, the immediate predecessor of this bill. Senator Kennedy, the sponsor of both S. 2796 and S. 1619, set the tone in his opening remarks at the hearing by recognizing the "intrinsic value of our national cultural heritage and the need to sustain an environment in America which encourages cultural diversity and artistic excellence."[1]

Basic Principles of S. 1619

1. The Concept of Ownership. The bill under consideration today is the result of a number of refinements. For visual artworks, it would make a sharp distinction between the artist's copyright and the transferee owner's copyright, establishing for the first time an artist's federal

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[1] Hearings on S. 2796 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary, 99th Cong., 2d Sess. 1 (1986).

right of personality. In contrast to economic rights, these personal rights do not transfer with an assignment or sale of copyright ownership. S. 1619 would give visual artists two new kinds of personal rights: moral rights and resale royalty rights. They are expected to remain with the artist for his or her lifetime, and, upon the author's death, to pass to the estate of the artist.

Although the artist may assign royalty collection to an agent, the bill specifies that the artist may not waive his or her resale royalties. It does not expressly state whether the author may assign or waive his or her moral rights, although non-assignability or non-waivability seems implied by the language that the artist shall have the right during his or her lifetime even where someone else holds the copyright. If the moral rights can be assigned or waived, it is unclear under what circumstances a court would enforce either.

2. Aesthetic Considerations. S. 1619 creates special federal rights for works of fine art, which are defined as pictorial, graphic, or sculptural works of "recognized stature." The bill allows "recognized stature" to be established by expert opinions from artists, historians, curators, and others knowledgeable in the field of fine art. Traditionally, the copyright law has not given additional rights to a work based on its quality. Under present copyright law, the author of a Pulitzer Prize winning work has no more substantive rights than the author of a schoolgirl's doggerel. The proposed distinction based on aesthetics has preservation and national cultural interests as the raison d'etre; it may be in the national interest to treat works of greater aesthetic merit with greater respect. In copyright law, however, the marketplace has

traditionally controlled the benefits accorded works of differing quality. Congress has so far been unwilling to let judges act as arbiters of aesthetic quality.

3. Scope of Application. Despite the limitations of two of the special rights to works of fine art, the bill gives limited moral rights to all pictorial, graphic, and sculptural ("PGS") works other than works made for hire. Congress should consider whether the bill should apply to the entire "PGS" category, as it now is interpreted in the copyright law, including works of applied art, toys, games, and the like, or whether even the limited moral rights should apply to the much smaller category of works of fine art such as paintings, drawings, and sculpture. Exclusion of works made for hire limits the number of "PGS" works eligible for moral rights protection.

Federal Rights Conferred

The bill gives a work of fine art four new federal rights, two of which apply also to all pictorial, graphic, and sculptural works, not just works of fine art. Three of the rights are an offshoot of the moral right, and the last is the droit de suite.

1. Right of Paternity. Under the Kennedy bill, works of fine art that are publicly displayed have both positive and negative paternity rights. An author of a work of fine art may require that his or her name be placed on any such work, or require that the name be removed from a work that has been distorted, multilated or otherwise altered. This right to have the author's name removed does not exist for visual artworks that are not works of fine art.

The ordinary remedies of the copyright law apply: injunction, actual and statutory damages or an award of the infringer's profits, and attorneys' fees.

2. Right of Integrity. The bill gives the author of any publicly displayed visual artwork an integrity right, irrespective of the quality of the work. The author can assert copyright infringement if his or her work is substantially or significantly distorted, mutilated, or otherwise altered, provided that the changes are the result of intentional or grossly negligent conduct.

3. Right Against Destruction. In addition to the right against distortion, mutilation, or other alteration, the bill confers upon authors of works of fine art a right to recover monetary damages for the destruction of a work, when such action is intentional or the result of gross negligence. This extraordinary right would be awarded exclusively to works of fine art in recognition of the national interest in preserving both the unique intellectual property and its embodiment.

Under certain circumstances, the previously granted moral rights are deemed waived when the owner of a building wishes to remove a work of art from the structure in which it is incorporated. Where the work cannot be removed from the building without distortion, mutilation, or other alteration, the author's moral rights continue only if they were 1) reserved in a written document signed by both the author and the owner of the building, and 2) recorded in the state's real property records before the work of fine art is installed. If these conditions are met, future owners of the building are bound. Otherwise, moral rights are considered waived and the building owner can proceed with the intended action.

Where a work of fine art can be removed from a building without substantial harm, the author's moral rights continue unless the building's owner notifies the author or diligently attempts to notify the author without success. The author has ninety days after receiving notice to remove the work or to pay for such removal, thereby taking title to it.

Where the author is dead, the owner of the building would have to notify the author's heir, legatee, or personal representative in writing of the opportunity to remove the artwork in appropriate cases. As a significant number of works installed in or on buildings may be considered works of fine art just by reason of their selection as decoration, this right will impose new obligations on building owners. Thus, there will be custodial obligations with respect to protecting the work from defacement as well as an obligation to maintain information about the author, in case notification is necessary.

4. Right to Resale Royalties. The author's right to royalties on resale of his or her works applies to all pictorial, graphic, and sculptural works that resell above a certain price and appreciation level. The resale royalty is payable only on artworks resold for a gross price of $1,000 or more and 150 percent or more of the seller's original purchase price. The seller pays 7 percent of the increase in value over his or her original cost. No aesthetic standard is imposed on the author's right to royalties when the work of art is sold.

In order to qualify for a resale royalty, the author must register in the Copyright Office as an author before the resale occurs. Additionally, when a work on which royalties are payable is sold, the seller must register the transaction in the Copyright Office. The seller's penalty for failure to register the transaction is equal to treble the royalties owed. The bill directs the Register of Copyrights to issue procedures for both new registration requirements.

Elimination of the Copyright Notice

The bill would also eliminate the notice of copyright requirement in the case of pictorial, graphic, and sculptural works.

The notice requirements have long been part of the U.S. copyright law. The Copyright Office doubts that the benefits of the notice should be set aside with respect to a single category of works. Elimination of the notice for only one category of works may also confuse the public. Moreover, the Office perceives no clear justification for this partial elimination of notice, especially since the notice is not now required for unpublished, unique works of fine art. If the work is published, under present copyright law, a notice of copyright may be placed on a part of the artwork not usually viewed by the public -- for example, on the base of a sculpture or the back of a painting. Instead of piecemeal elimination of the notice requirement, the Copyright Office recommends that the Subcommittee consider it as part of the Berne implementing legislation. Indeed, the Ad Hoc Committee on the Berne Convention urges its elimination across-the-board as a pre-condition to U.S. adherence.

Exclusions

The criminal penalties do not apply to the author's moral and resale royalty rights. The rights are supplementary to the economic rights of copyright, which the author may also hold. It is appropriate that only civil penalties apply to these additional personal rights.

Consistent also with personal rights, the rights created by the bill do not apply to works made for hire. Thus, neither employees nor employers of works made for hire may claim benefits under this bill.

Comments on the Registration Provisions

S. 1619 assigns the Copyright Office two registration functions. First, in order to be eligible for resale royalties an artist must register with the Copyright Office. Second, all transfers of artistic works subject to a resale royalty must be registered with the Copyright Office. The specifics of the registration procedures are to be determined by Copyright Office regulations, and no explicit fee is designated for providing these services.

Section 708 of title 17 specifically designates the fees for most services of the Copyright Office. Services not specifically designated, however, may fall within catch-all subsection (a)(11) providing fees "for any other special services requiring a substantial amount of time or expense, such fees as the Register of Copyrights may fix on the basis of the cost of providing the service." The Copyright Office believes this provision could be invoked to allow the Copyright Office to charge for the cost of providing the registration services proposed in S. 1619. Budgetary considerations would preclude the Office from offering the services for free. The applicability of section 708(a)(11) authorizing the charging of a reasonable fee should be made clear in the legislative history.

An artist registering for resale royalty eligibility may designate a collecting society as his or her representative. Conceivably, this provision could foster the establishment of organizations similar to the existing music performing rights societies.

The registration system for transactions requiring a resale royalty is distinguishable from other registration systems maintained by the Copyright Office in that the party registering the transaction receives no benefit from making a registration. The existing registration systems generally create public records of copyright ownership rights, or the right to a compulsory license. Registration of visual artwork transactions, on the other hand, documents the obligation of the seller to pay the artist a resale royalty. The high degree of voluntary compliance applicable to existing registration systems maintained by the Copyright Office may not be achieved with respect to registrations of fine art transactions.

The penalty for nonregistration of visual artwork transactions is the possibility of a suit by the artist or collecting society, which would subject the seller "to a penalty equal to treble the amount of the royalty owed." Clearly, enforcement falls almost entirely on the artist or his or her representative. Commentators on the California Resale Royalties Act report that the primary weakness of that Act is the inability or unwillingness of artists to sue to enforce their rights.[2] That Act does not have a central registration system like S. 1619; the central registry should facilitate suits by artists.

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[2] J. McInerney, "California Resale Royalties Act, Private Sector Enforcement," 19 U. of San. Fran. L. Rev. 1 (1984).

The seller is responsible for making the resale royalty payment directly to the artist, presumably by locating the address of the registered artist, or the designated representative, in the records of the Copyright Office. The Copyright Office has no direct role in the payment scheme.

S. 1619 is unclear as to what happens if there is a break down in the system. What happens if the address of the registered artist is not current? What standards of diligence are imposed on the seller to locate the artist? May the seller deduct expenses incurred in locating an artist whose address is not current in the Copyright Office?

Noncompliance with the royalty resale provisions allows the artist to seek two distinct remedies. Nonpayment of royalties is designated as a "copyright infringement" and presumably all the remedies specified in Chapter 5 of title 17 would be available to the artist. Most significant of these remedies would be actual damages (likely the amount of the royalties owed), statutory damages, and attorneys' fees. Nonregistration of transactions is also designated as a "copyright infringement," but S. 1619 specifies a penalty of "treble the amount of the royalty owed." The nature and relationship between these two remedies is unclear. For nonregistration of transactions, is "treble the amount of the royalty owed" intended as the sole remedy, or is it additional to other Chapter 5 remedies? Are the penalties for nonpayment and nonregistration cumulative, allowing an artist to receive treble royalties for nonregistration, plus statutory damages and attorneys' fees for nonpayment?

State Laws Protecting the Personal Rights of Artists

Three states have laws protecting the personal rights of artists in a fashion similar to S. 1619: California, New York, and Massachusetts. Of these three, only California provides for a resale royalty. S. 1619 is silent as to whether enactment would preempt these state laws. Unless it is amended, section 301 of title 17 would seemingly preempt these laws. A brief discussion of the three state statutes follows:

California

California was the first state to enact legislation granting rights similar to those in S. 1619. The California Resale Royalties Act compensates visual artists for the appreciated value of their work upon sale.[3] The California Art Preservation Act protects the integrity of an artist's work, and establishes a right of attribution.[4]

The Resale Royalty Act was passed in 1977 after publicity cast attention upon a few lucrative resales of works by contemporary artists.[5] The Act was controversial, and was quickly challenged by an art dealer as being preempted by the 1909 federal Copyright Act. The Ninth Circuit rejected this contention in Morseburg v. Balyon.[6] In 1982, the Act was amended to deal with the perceived enforceability shortcomings of the original legislation.

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[3] Cal. Civ. Code §986 (West Supp. 1984).

[4] Cal. Civ. Code §987 (West Supp. 1984).

[5] In the mid-1970's, Robert Rauchenberg's painting Thaw was auctioned for $85,000. Reportedly it had been purchased about fifteen years earlier for $960. The Whitney Museum reportedly paid $1,000,000 for Jasper John's Three Flags, while the artist earned only $900 from its original sale.

[6] 621 F.2d 972 (9th Cir. 1980). The preemption issue has not been litigated with respect to the 1976 Copyright Act. In light of section 301 of title 17, a preemption argument based on the current copyright law would likely be stronger.

Under the California law, resale royalties apply only to transactions occurring in California, or to transactions where the seller is a resident of California. All transactions must be for more than $1,000 and the gross sales price must be greater than the original purchase price. For transactions subject to the royalty, the royalty is 5 percent of the gross selling price.[7]

The greatest shortcoming of the California law has been enforceability. The lack of a central registration system has been attributed as a major source of the problem. One commentator summed up the situation in the following words:[8]

> Despite the (1982) amendments, the Act is perhaps the State's most neglected and underused law. Many of those who could benefit are ignorant of the Act; others who are aware of the Act feel impotent to enforce it. Those whom the Act seeks to regulate do not comply with its provisions. The monitoring necessary for individual enforcement is an impossible bureaucratic nightmare attempted by no

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[7] Under S. 1619, appreciated value serves as the basis for determining the royalty rather than gross selling price.

[8] McInerney, "California Resale Royalties Act: Private Sector Enforcement," 19 U. of San. Fran. L. Rev. 1, 3 (1984).

> one. Apparent lack of effective means to collectively enforce the Act has made it virtually irrelevant. As a result, visual artists continue to be exploited and remain uncompensated for their residual interests in resold artwork.

The California Art Preservation Act seeks to preserve works of fine art and protect the personality of the artist. The Act prohibits the intentional "defacement, mutilation, alteration, or destruction of a work of fine art." Where the alleged mutilation was associated with an effort to conserve a work of fine art, evidence of gross negligence is required. Additionally, the artist has a right of attribution, or "for just and valid reason" the right to "disclaim authorship of his or her work of fine art." The rights of attribution and integrity may be waived by written contract. Owners of buildings who wish to remove a work of fine art capable of removal without mutilation, are subject to liability under the Act unless they attempt to notify the artist of their intention, and provide the artist with an opportunity to remove the work.

New York

In 1984, New York passed its New York Artists' Authorship Rights Act.[9] The statute prohibits the display of an "altered, defaced, mutilated, or modified form" of a work of fine art which damages the artist's reputation. There is no explicit prohibition against destroying a work, although destruction in the context of damaging an artist's reputation might fall within the Act. The artist additionally has a right of attribution, and the right to disclaim authorship for good cause. Conservation does not constitute alteration, defacement, mutilation, or modification unless the conservation is done negligently.

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[9] N.Y. Arts & Cultural Affairs Law §14.03 (McKinneys 1987).

Massachusetts

Passed in 1984, the Massachusetts statute prohibits "the intentional commission of any physical defacement, mutilation, alteration, or destruction of a work of fine art."[10] The artist retains a right of attribution, and the right to disclaim authorship "for just and valid reason." If a work of fine art cannot be removed from a building without substantial alteration, the prohibitions of the Act are suspended unless a written obligation signed by the owner of the building has been recorded. If the work is capable of being removed without mutilation, then the prohibitions of the Act apply unless the owner notifies the artist and provides the artist with an opportunity for removal.

European Concept of Droit de Suite

Droit de suite, within the framework of continental European jurisprudence, is generally justified on the ground that the author/creator has the fundamental right to participate and share in every commercial exploitation of his intellectual creations.

Writers and composers, through the system of royalty payments, participate continuously during the term of copyright protection in the commercial exploitation of their creative works. Artists, on the other hand, do not generally enjoy the same prerogatives because of practical and legal constraints. An original work of art is an intellectual creation

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10. Mass. Gen. Law Chap. 231 §86S (West 1987).

embodied in a tangible object. Since the value of such a work is measured in terms of its uniqueness, it is not susceptible to the ordinary modes of copyright exploitation (reproduction, performance, etc.). Its exploitation, nonetheless, occurs with every sale (resale) for a monetary consideration. Droit de suite -- the right to follow proceeds generated from such sales or resales -- is a system established in relatively few countries to allow the artist to share in the continued exploitation of his or her work of art.

The concept of droit de suite11/ has developed somewhat ambiguously and equivocally on the European continent. It is generally inspired both by sentiments of equity and philanthropy.

Several theories have evolved within the scope of European jurisprudence, attempting to explain or justify the existence and juridical nature of the droit de suite. It has been described as a levy or tax, based on philantropic considerations, to promote social welfare of the artists and their heirs. Others have explained it as based on the inherent "latent value" of artworks. According to this theory the artist is deemed to have, at the moment of creation of an original work of art because of his or her labor, the right to share subsequently in an overt increase in

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11. The term droit de suite comes from French real property law. Under article 2279 of the Civil Code, a taker of personalty cuts off all rights of the true owner, for "in the matter of personalty, possession equals title." The only exception is in the instance where the holder is a thief or finder and the owner vindicates his rights in three years. Rights to realty are, however, more sacred, and an owner or a creditor may pursue the realty in the hands of a taker, even a bona fide one. Creditors may not do the same to personalty, for the chattel mortgage, as such, does not exist in French law. This right to pursue or follow the property (realty) is called, literally enough, the "follow-up right" (droit de suite). Rita E. Hauser, "The French Droit de Suite: The Problem of Protection for the Underprivileged Artist Under the Copyright Law," 11 ASCAP Copyright Law Symposium, 1, 5, n. 14 (1962).

the sale price. A failure to share in the added value would give rise to an unjust enrichment on behalf of a noncreative purchaser. Some have justified the resale royalty on a principle of contract law that permits and justifies the modification of a sales contract by a court when hardship results from circumstances unforeseen at the time of the making of the first sales contract.

The foregoing theories were advanced primarily because the first European laws of droit de suite were outside the framework of the copyright law. In the omnibus revision of the French copyright law in 1957, droit de suite became an integral part of the French Copyright Act. This now is also true of Belgium, West Germany, Czechoslovakia, Hungary and Yugoslavia.

Droit de suite is generally applicable to works of fine art. In Europe it does not generally apply to reproductions, architectural works and works of applied art.A limited consensus has evolved on the propriety to reward the artist/creator. Disagreements, however, continue as to the best methods for granting this reward.

Ever since 1920, France has employed a simple approach whereby the authors of "graphic and plastic works" (whose price is more than 10,000 francs) receive a royalty (currently 3%) on the gross sale price of the works sold "either by auction or by merchant." For political and practical enforcement reasons, the law has not in fact been applied to sales by merchants. A similar approach is used in the German Copyright Act of 1965. The price received on a resale of an original work of art for 100 DM or more, with an "art dealer or an auctioneer" as purchaser, vendor or agent, is subject to a five percent royalty. This right is inalienable and unwaivable. The law, however, does not apply to architectural works and works of applied art. The right expires after ten years.

The Italian regime of droit de suite is based on the "value plus" principle which, without discrimination between public and private sales, grants the artist the right to participate in the profits of the owner/vendor. The "capital gain" royalty, which was first recognized in Italy by the 1941 Copyright Act, is substantially in effect to the present day. The law however has been applied retroactively to works of art sold by an artist before its effective date. The Italian law basically provides that the creators of works of art in the form of paintings, sculptures, drawings and prints shall be entitled to (1) a percentage of the amount by which the price of the first public sale of original copies of such works exceeds the price of first alienation or transfer of the physical object, and (2) a percentage of the capital gain that the original copies of their works ultimately acquire in successive public sales. The law also provides that an increase in value shall be presumed, and prescribes an elaborate system of percentages applicable to public and private sales. The percentages established for the public sales are applicable only if the selling price is in excess of 1000 lire (4000 lire for private sales) for drawings and prints; 5000 lire (30,000 lire for private sales) for paintings; and 10,000 (40,000 lire for private sales) for sculptures. In practice, this legislative design has proven to be difficult to apply and enforcement has been lax.

In France and Germany, the droit de suite regimes have worked with fair success, but the general consensus seems to be that there are some serious problems in enforcing droit de suite.

RALPH OMAN
U.S. REGISTER OF COPYRIGHTS

BIOGRAPHY

Ralph Oman is the Register of Copyrights, head of the Copyright Office -- a position he has held since September 1985.

Born in Huntington, New York, on July 1, 1940, Mr. Oman received a bachelor of arts degree in history from Hamilton College in 1962 and a doctor of laws degree in corporate and international law from Georgetown University in 1973. He is a member of the District of Columbia Bar, the Supreme Court Bar, and the American, Federal, and District of Columbia Bar Associations.

Before he became Register of Copyrights, Mr. Oman was chief counsel for the Senate Subcommittee on Patents, Copyrights and Trademarks. He participated in the subcommittee's oversight responsibility for the Copyright Office, the Patent and Trademark Office, and the Copyright Royalty Tribunal.

Other experience includes five years of active duty with the U.S. Navy, service as a trial attorney with the U.S. Department of Justice Antitrust Division, and as Counsel for the Minority Leader of the U.S. Senate, Hugh Scott of Pennsylvania. He has also served with the U.S. Department of State as a foreign service officer, as legislative aide to Senator William Roth, and press aide to Senator Scott. Following law school, Mr. Oman served as law clerk to the Honorable C. Stanley Blair, U.S. District Court, Baltimore, Maryland.

SUPPLEMENTAL STATEMENT OF
RALPH OMAN
REGISTER OF COPYRIGHTS
ON THE VISUAL ARTISTS RIGHTS ACT OF 1987

In response to the invitation in your letter of December 9, 1987 to submit additional information regarding S. 1619, I am submitting further views with respect to the proposed elimination of the notice of copyright requirement.

Current copyright law requires works published under the authority of the copyright owner to contain a copyright notice. The Visual Artists Rights Act of 1987. S. 1619 would amend the copyright law to provide that the notice requirements "shall not apply to pictorial, graphic, or sculptural works." However, section 8 of the bill, which would not be codified in title 17, provides that none of the amendments of S. 1619 apply to "a work made for hire as defined in section 101 of title 17, United States Code."

In written testimony on S. 1619, I made the following statement:[1]

> The notice requirements have long been part of the U.S. copyright law. The Copyright Office doubts that the benefits of the notice should be set aside with respect to a single category of works. Elimination of the notice for only one category of works may also confuse the public. Moreover, the Office perceives no clear justification for this partial

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[1] Written Statement of Ralph Oman, Register of Copyrights, Before the Subcommittee on Patents, Copyrights, and Trademarks, Sen. Comm. on the Judiciary on S.1619 (Dec. 3, 1987), page 8.

> elimination of notice, especially since the notice is not now required for unpublished, unique works of fine art. If the work is published, under present copyright law, a notice of copyright may be placed on a part of the artwork not usually viewed by the public -- for example, on the base of a sculpture or the back of a picture frame. Elimination of the notice requirement should be considered as part of the Berne implementing legislation rather than on a piecemeal basis.

I have reflected further regarding the utility of the notice requirement on fine art works and submit these further comments.

1. Current Notice Requirements.

Under section 401 of title 17, works published under the authority of the copyright owner in the United States or elsewhere are required to contain three elements: (1) the symbol "©" (the letter C in a circle), or the word "Copyright," or the abbreviation "Copr.," (2) the year date of first publication, and (3) the name of the copyright owner. Pictorial, graphic, or sculptural works reproduced "in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles" may omit the year date in the notice.

As to the position of the notice, section 401(a) requires the notice to be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright. The Register of Copyrights is authorized to prescribe by regulation examples of reasonable methods of affixation and positions, but the specifications are not exhaustive. Copyright Office regulation 37 C.F.R §201.20 implements this authority. For pictorial works reproduced in two-dimensional copies, the regulation provides the notice may be "affixed directly or by means of a label cemented, sewn, or otherwise attached durably so as to withstand normal use, on the front or back of the copies, or to any backing, mounting, matting, framing, or other material on which the copies are durably attached, so as to withstand normal use, or in which they are permanently housed."[2] For three-dimensional sculptural works, the regulation provides the notice may be "affixed directly or by means of a label cemented, sewn, or otherwise attached durably, so as to withstand normal use, to any visible portion of the work, or to any base, mounting, framing, or other material on which the copies are durably attached, so as to withstand normal use, or in which they are permanently housed.[3]

Sections 405 and 406 cover notice informalities. Under section 405, copyright in a work published without notice is not invalidated if one of three circumstances is present: (1) the notice was "omitted from no more than a relatively small number of copies;" (2) registration has been made within five years of publication without notice and a "reasonable effort is made to add notice to all copies . . . after the omission has been discovered;" or (3) notice was omitted in violation of an "express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies, they bear the prescribed notice." Section 406 covers errors in the name or year date. Where the notice lacks a name or year date, the notice is treated as omitted. If the name is wrong, copyright validity is not affected, but persons innocently misled are generally not liable for infringement. Year dates earlier than the year date of first publication shorten the duration of protection, while year dates more than one year later than first publication are treated as omissions.

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[2] 37 C.F.R. §201.20(i)(1).

[3] 37 C.F.R. §201.20(i)(2).

2. History of the Notice Provision and Arguments For and Against Maintaining the Requirement.

The requirement that published copies of copyrighted works bear a notice of copyright has been in the U.S. copyright law since 1802. The first U.S. copyright law enacted in 1790 required that notice of copyright be given by publishing the record of copyright registration in one or more newspapers.

Traditionally, in the United States, the notice requirement has been a condition of copyright protection. Under the 1909 Copyright Act, with the exception of certain unpublished works, copyright protection was secured by publication with copyright notice on all copies. The statute strictly specified the form of the notice and its location. When Congress considered revision of the law during the 1960's and 1970's, the appropriateness of retaining the notice requirement was a prominent issue. The arguments against a mandatory copyright notice have included:

1. Notice is anomalous. -- Everyone is entitled to the fruits of his labor; the notice requirement, which forces an author to make an affirmative claim or forfeit copyright protection, is in basic conflict with this principle.
2. Notice is anachronistic. -- Most of the other countries of the world require no general notice formalities, and in clinging to the requirement the United States is hopelessly behind the times.

3. Notice is useless. -- Since anyone wishing to determine the ownership or expiration date of a copyright must necessarily go beyond the notice, it is in reality a meaningless technicality.
4. Notice is unjust and oppressive. -- Many copyrights are lost because of technical defects in the notice over which the author had no control; an author is not an executive and is not equipped to deal with complex formalities.

Arguments in support of a notice requirement have included:

1. Notice is socially desirable. -- No one is interested in copyrighting the large majority of published works but, without formalities, they would be pointlessly kept in the private domain for many years; this would inevitably hamper scholarship and free cultural interchange.
2. Notice fits the U.S. situation. -- Far from being an outmoded concept, notice is increasingly needed to meet the demands for copyright information created by technological developments and the growing number of "secondary users."
3. Notice accords with the U.S. theory of copyright. -- Copyright in the United States is a limited grant of an exclusive right to provide an incentive to creation, rather than a natural right of the author. It is thus appropriate to require the author to fulfill certain conditions that are of benefit to the public.

4. Notice is effective in practice. -- Notice fulfills a vital function in informing the public that a claim exists, and in providing users with at least a starting point for determining ownership and duration. The burden of affixing a notice is generally very slight.

In 1961 the Register of Copyrights stated that he believed that the public interest was served by "keeping free of copyright restrictions the great bulk of published material in which the authors do not wish to secure copyright."[4] The Register noted that "[t]he copyright notice is a simple and highly useful device to accomplish that purpose and also give the public information as to the copyright status and ownership of any work."[5] The Office therefore urged continuation of a notice requirement on published copies but recommended certain changes to avoid the forfeiture of copyright through omission of errors in the notice. The notice requirements were substantially liberalized in the present copyright law, as described earlier.

3. Formalities and the Berne Convention.

At least since 1908, the absence of "formalities" has been generally understood as one of the salient characteristics of the Berne Union. Between 1924 and 1941 there were legislative efforts to bring U.S. law into compliance with the Berne Convention in order to facilitate U.S. adherence. At the time, the Berne Convention was the only multilateral copyright convention in existence, and adherence to the Convention would have simplified U.S. international copyright relations. The bills seeking to promote adherence generally

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4. *Report of the Register of Copyrights on the General Revision of the United States Copyright Law*, House Comm. on the Judiciary, 87th Cong., 1st Sess. 63 (Comm. Print 1961).

5. *Id.*

eliminated the notice of copyright as a condition of copyright protection but included substantial inducements to encourage the use of the notice. With the creation of the Universal Copyright Convention, interest in the Berne Convention subsided.

Interest in the Berne Convention has recently been rekindled. All experts agree that the notice of copyright must be changed in order to adhere to the Berne Convention. The proposals presently before Congress modifying U.S. law to conform to the Berne Convention would repeal the notice requirement outright.[6] While the Copyright Office believes there are some advantages to maintaining the notice requirement, the Congress may decide that these benefits are outweighed by the substantial benefits that would be secured from Berne adherence. For this reason, the Copyright Office has not opposed modification of the notice requirement for the purpose of Berne membership. If the United States decides to join Berne, we must forego notice as a condition of copyright protection.

4. Notice on Pictorial, Graphic, and Sculptural Works.

The copyright notice requirement applies to all works "published in the United States or elsewhere by authority of the copyright owner." With respect to pictorial, graphic, and sculptural works there is one unusual exception to the general notice requirements. Where a pictorial, graphic, or sculptural work is reproduced on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful article, the year date may be omitted. As a result, the notice requirement for works of the fine arts is in this case more stringent than for works of the applied arts.

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[6] S.1301, 100th Cong., 1st Sess. (1987); H.R. 1623, 100th Cong., 1st Sess. (1987); H.R. 2962, 100th Cong., 1st Sess. (1987).

As to what constitutes "publication" of a work of art, the legislative history indicates that one-of-a-kind paintings and sculptures are generally not considered published. Representative Kastenmeier, Chairman of the House Subcommittee responsible for copyright legislation made this point on the floor of the Congress immediately before passage of the Copyright Revision Bill:[7]

> Mr. Chairman, before concluding my remarks I would like to discuss several questions which have been raised concerning the meaning of several provisions of S.22 as reported by the House Judicary Committee and of statements in the committee's report, No. 94-1476. One of these questions involves the meaning of the concept of "publication" in the case of a work of art, such as a painting or statue, that exists in only one copy. It is not the committee's intention that such a work would be regarded as "published" when the single existing copy is sold, or offered for sale in the traditional way -- for example through an art dealer, gallery, or auction house. On the other hand, where the work has been made for reproduction in multiple copies -- as in the case of fine prints such as lithographs -- or where multiple reproductions of the prototype work are offered for purchase by the public -- as in the case of castings from a statue or reproductions made from a photograph of a painting -- publication would take place at the point when reproduced copies are publicly distributed or when, even if only one copy exists at that point, reproductions are offered for purchase by multiple members of the public.

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[7] 122 Cong. Rec. H10874-75 (1976).

Works of applied art are ordinarily created as works made for hire. If S. 1619 were enacted into law as presently drafted, most works of applied art would still require a copyright notice, despite amendatory language that purports to eliminate the copyright notice for "pictorial, graphic, and sculptural works." While it is clearly within the discretion of Congress to establish different copyright rules governing works made for hire, and works created by individual authors, the differing standards should be expressly drawn in title 17. The Copyright Office suggests that the exclusion for works made for hire should be effected by an amendment of title 17 itself; for example the phrase "other than works made for hire" could be inserted at certain points in the bill.

S. 1619 addresses the concerns of artists about the notice requirement. It is clear that many artists regard the notice provisions as onerous. They are concerned that even one-of-a-kind works might be exploited in a way that would constitute publication. They also complain that placement of a notice on a work defaces the work. This complaint is particularly voiced with respect to limited edition prints.

The Copyright Office believes some of the artists' complaints are overstated, and are based on insufficient information about the copyright law. The statutory language of the 1976 Copyright Act, coupled with the legislative history, seemingly establishes that one-of-a-kind works are not published by sale or public exhibition. There is admittedly some uncertainty regarding the effect of distributing, with the artist's permission, photographs of a work of art where the photographs lack a notice. The expressed concern regarding defacement of a work by a copyright notice has been addressed by Copyright

Office regulations that authorize placing the notice on the back of a work or on any "base, mounting, or framing . . . on which the copies are durably attached."

Despite these considerations, artists do have unique copyright problems. Typically, artists earn a livelihood from selling one-of-a-kind works and are thus distinguishable from other authors who earn royalties from public distribution of copies or public performance of their creations. Artists are unfamiliar with copyright notice requirements, and some of the cases concerning notice are confusing and conflicting.

Prior to the 1976 Copyright Act, the copyright notice requirement was set forth in specific detail in the law, and noncompliance generally led to divestment of copyright protection. Both good and bad consequences flow from a strictly applied notice requirement. The bad consequences concern the unfortunate loss of copyright protection by deserving authors from inadvertent notice errors. On the positive side is legal predictability.

When the copyright law was amended in 1976 the notice requirement was substantially liberalized, that is, made less stringent. Predictability has diminished. Today, the securing of a printed copy of a work without notice of copyright is no longer a good indication that the work is in the public domain. Under the former law, such evidence supported the conclusion that the work was probably in the public domain.[8]

Today, the major benefit of the notice requirement appears to be the reference tool it provides users. The vast majority of published works comply with the notice provision without any difficulty. The notice provides the user with copyright information that otherwise might be difficult to obtain. In addition, works fall into the public domain five years after publication without notice, unless appropriate steps are taken to cure the "error." Repeal of the notice requirement, whether in part or in total, would eliminate a public reference tool that is widely available today and would keep the entire body of published works under copyright for an average period of 75 years.

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[8] Even under the 1909 Act there was no certainty that discovery of a printed copy of a work not bearing a copyright notice meant the work was in the public domain. The copy might have been piratical or distributed in such small quantities as to remain unpublished. Yet, it was clear that a general publication of a work without notice permanently placed the work in the public domain.

In earlier testimony on S. 1619, the Copyright Office voiced concern over piece-meal elimination of the notice requirement by subject matter. It is important to remember that the vast majority of people using the copyright notice everyday are not lawyers. This is true both for authors and for users. Under the copyright law today section 401 is simple and straight-forward. It applies to all published works. If a process is begun whereby certain categories of published works are withdrawn from the notice requirement, the Copyright Office is concerned that the nature of the notice requirement will become obscure to the lay public.

Despite these concerns, it is clear that artists face some unique problems. If Congress concludes that creators of fine art works need special notice accommodations, the Copyright Office recommends that all changes should be explicitly provided for in title 17 so that the public can be certain of the copyright requirements.

To remove any question about application of the notice on one-of-a-kind artworks, the Office would support an amendment specifically eliminating the notice on such works, even when repoduced in photographs. If the Congress also wants to eliminate the notice for limited edition reproductions of fine art works, we suggest that the law limit the size of the edition exempted from notice of copyright; for example, editions of no more than 100 reproductions might be exempt.

RESPONSES TO SUPPLEMENTAL WRITTEN QUESTIONS FROM SENATOR HATCH

1(a). One strong argument for this bill is that artists and sculptors, unlike composers or writers, have no direct mechanism to share in the future value of their works. Composers, for instance, get a royalty payment based on the popularity and use of their music on TV or radio programs. Sculptors or painters, however, may not profit directly from the increasing value of their work. It seems, however, that the 7% resale fee in this bill does not really compensate based on the appreciation of the work. Instead it collects a fee each time a work is sold so that one artist whose work is sold five times in a year may get a windfall while an artist whose work is so valuable that it is never sold may get no compensation whatsoever. Does this fee seem to be based on actual royalty principles or is it based on a more arbitrary scheme?

Answer:

While the scheme does not seem arbitrary, S. 1619's proposals do differ from royalties paid composers, dramatists, and choreographers. The difference is between payment upon continued use (performance) of the intangible copyrighted work, and payment upon sale of the physical property embodying a copyrighted work. In the latter sense, the bill proposes a solution similar to that in the Record Rental Act since it calls for payment upon disposition of the physical object.

If the decision is made to compensate artists based on appreciation of the work, such compensation would have to be attached to a transaction. A work that is never sold has no clearly ascertainable appreciation value. Appreciation is even more speculative when dealing with the one-of-a-kind works that the bill contemplates.

The price of a single artist's works may differ widely depending on a number of factors, for example, size of the work, period of the artist, subject, time of the sale, etc.

A more realistic view of a work's appreciation would be represented if one also factored in the depreciated value of the dollar at the time of resale. This may have already been accounted for in fixing the royalty at seven percent.

In the instance where a work is sold five times a year, presumably the incremental appreciation at each sale would be smaller than when a work is sold after a longer period of time. Presumably, the 150% appreciation required to trigger the royalty would not be reached in any of the five transactions. Where it is reached, a royalty to the artist does not seem to represent a windfall.

Where a work is never resold, the original purchaser makes no profit on his or her purchase, and the artist is not deprived of any compensation since no one profits after the original sale.

1(b). Can you suggest a better way to account for appreciation of a work?

Answer:

No, not in the case of single-copy works of art. Payment based on the number of visitors to art galleries would be difficult to administer, and would be contrary to the interest of encouraging public attendance. As a partial solution, wide availability of authorized reproductions (prints, etc.) could be encouraged, and artists could get a fair share of the income from licensing reproductions.

2(a). The resale fee provision raises another question. This essentially severs an artist's rights from the rights of the owner of the painting or work of art. The artists retains a right to 7% resale fees. Can the artist transfer this right to resale fee? Could this right be sold to the owner of the painting for an additional fee at the time the work is purchased? Could the right be transferred to another who does not own the work?

Answer:

We will analyze three kinds of transfers: transfer to the owner of the painting at the time the work is purchased; transfer of the right to a third party for any purpose and at any time; and transfer of the right to collect royalty fees on behalf of the artist.

S. 1619 would seem clearly to prohibit the first transfer to the purchaser of the painting, even for an additional fee. Many artists have little or no bargaining power and would not be able to negotiate a reasonable additional fee. If the law allowed such a transfer, the buyer of the painting could simply assign a portion of the purchase price to the purchase of the resale royalty, thereby rendering the resale right illusory.

The bill would apparently not allow a transfer of an inchoate expectancy to third parties since the bill endeavors to give the artist a share in the resale after the work has had time to appreciate. In theory the value of a resale royalty might be worked out according to certain assumptions about the market: for example, one could base an additional fee on an average appreciation rate, keyed to inflation and other market factors. In addition, a sale back could be limited to a certain time period, such as 10 years, after which resale royalties would then become payable to the artist again. However, this kind of transfer also has the potential of bringing only illusory benefits to the author. The bill apparently intends to preclude this transfer by specifying that the right of the author to receive the royalty may not be waived. If this is the intention, the language could be tightened.

Transfer of the resale right to a collection agent for the artist is clearly permissible under S. 1619.

2(b). What implications does this have for the work-for-hire doctrines? I understand that the bill excludes works-for-hire, but is this bill likely to affect the underpinnings of the work-for-hire doctrine?

Answer:

No, the bill would not affect the work-for-hire doctrine. Most artists whose works are resold are not employees, and this should not change. Employees for hire are usually compensated by continuing salary and other employment benefits instead of royalty payments. If the bill became law there might be more attempts to place works within the work-made-for-hire category where an employment relationship does not exist in order to avoid the resale royalty. The artist would then receive only an upfront payment. Artists would have to resist such pressures, and probably could do so in the case of works of recognized stature.

3. I also have some questions about the moral rights doctrine. As I understand this concept, it allows an artist to assert copyright infringement if his or her artistic work is altered or distorted through intentional or negligent conduct. Does this mean that we would be likely to have federal infringement suits if the owner of a painting decided to display it upside down or if the owner of a painting negligently stored the painting so that it was damaged?

Answer:

Although the manner of displaying the work is technically neither an alteration, distortion, or mutilation of the work of authorship, the manner of display has been the subject of suit under moral rights concepts, here and abroad. See e.g., Rivers v. Conde Nast Publications, Inc., 84-5571 (S.D.N.Y. filed Aug. 6, 1984) (later settled out of court;) and Buffet v. Fersing 1962 Recueil Dalloz [D. Jur.] 570 (Cour d' Appel, Paris). Additional litigation, therefore, is not inconceivable. It is even more likely that suit could result from public display of a distorted copy damaged by negligent storage. In either case, the right exists only if the work is publicly displayed.

3(b). Are owners likely to understand that they are liable for conduct with paintings they suppose they own?

Answer:

Purchasers could easily be apprised of the law upon purchase of a unique work of art.

4. Are there already adequate moral rights protections in the United States?

Answer:

The answer, of course, depends on how one defines "adequate." Visual artists have made a strong case that under present law, moral rights protection is not adequate for their purposes. Clearly, there is no uniform, well-defined federal right. In another context, a consensus is building among legislators, commentators, and international representatives that existing moral rights protection is adequate to provide the minima required in order for the United States to adhere to the Berne Convention. The reason for the Berne/moral rights conundrum is that, generally, moral rights protection in the United States is less extensive than exists in many Berne Union countries, particularly the continental European countries. Moreover, since the nature and extent of moral rights requirements under the current version of the Berne Convention is unclear, this legislation could proceed, delaying the necessary "coming to terms" with Berne's moral rights requirements until the issue is considered in the context of that legislation.

ANSWERS TO SENATOR GRASSLEY'S QUESTIONS

1. Isn't it possible that an artist can sell his work conditional upon the requirements that:

   A. The buyer not modify the art without the artist's permission?

   B. The buyer, when he resells the work, pay a royalty to the artist?

   In other words, why should Congress legislate what individual parties in a free market can achieve by private agreement?

Answer:

The Copyright Office believes that an artist could theoretically impose contractual limitations on the transfer of a work of art that would be legally binding on the purchaser. Section 109(a) of title 17 provides that persons receiving lawful ownership of a particular copy of a work are entitled to dispose of it by sale, rental, or any other means. The Senate Report of the Copyright Revision Bill, Sen. Rep. No. 94-473, 94th Cong. 1st Sess. p. 72 (1975) clarifies this right by providing: "This does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright." Conditions with respect to either moral rights or resale royalty would seemingly be valid.

Although conditions imposed by contract would likely be valid, the artist might incur enforceability problems where the original purchaser transfers the work without disclosing the limiting conditions. In some cases, an artist might be limited to damages in a breach of contract suit against the original purchaser.

As a practical matter contractual limitations are seldom negotiated. Artists claim that marketplace realities preclude imposing such conditions because purchasers would not accept them. There does appear to be a consensus that works by unknown artists could not be sold with contractual limitations. The extent to which a well known artist could impose contractual limitations is an issue on which the experts disagree.

The last part of the question asks, "Why should Congress legislate what individual parties in a free market can achieve by private agreement?" Proponents of S. 1619 would argue that recognition of moral rights and resale royalties are necessary in order for artists to be treated equitably. As a practical matter, marketplace realities preclude establishing these rights by contract. Therefore, if you agree that artists deserve formal recognition and protection in the nature of moral rights and resale royalties, amendment of the Copyright Act is a logical and fair way to acheive these policy goals.

2. On the royalty issue: assuming the market value of an artist's work increases over time because the artist has achieved fame or popularity, and that the artist's later works are commanding a higher price than his earlier works, then why should the artist be entitled

to reap an additional profit from a buyer who took a chance on the "unknown" artist by buying an earlier-produced work at a lesser price?

Answer: Over a period of time, the manner in which an artist expresses himself may vary widely. As a result, it is fairly common that the value of an artist's output in one era of his life will be substantially different from the value of a different period. Proponents of S. 1619 argue the resale royalty is particularly needed where the earliest works of an artist are most valuable. In such circumstances, the artist might find it difficult to sell his or her current output at any price because it is in disfavor, while the earliest works command high resale prices. Opponents of S. 1619 argue that most artists save works from each artistic period, so that an artist with popular earlier works could still profit by selling retained earlier works. If the circumstances are reversed and an artist's later works are far more popular than his earlier works, the resale royalty provisions probably would not come into play because it is unlikely that the out-of-favor earlier works would sell for more than $1,000 and at an appreciation of 150 percent.

3(a). On defining a "work of fine art:" At what point should someone's creative work be entitled to the protections of the bill?

Answer: S. 1619 contains some provisions applying to all pictorial, graphic, and sculptural works and some provisions limited to "works of fine art." Except for cases of significant or substantial distortion, mutilation or other alteration, the moral rights provisions are limited to "works of the fine art." The resale royalty right is effectively limited to a narrow group of works by the minima established for sale and appreciation, in order to qualify for the royalty.

S. 1619 defines work of fine art as:

> "a pictorial, graphic or sculptural work of recognized stature. In determining whether a work is of recognized stature, a court or other trier of fact may take into account the opinions of artists, art dealers, collectors of fine art, curators of art museums, restorers and conservators of fine art, and other persons involved with the creation, appreciation, history, or marketing of fine art. Evidence of commercial exploitation of a work as a whole or of particular copies, does not preclude a finding that the work is a work of fine art."

In order to invoke the moral rights provisions regarding paternity of the work and destruction of the work, proof would have to be offered that a work qualified as a work of fine art. It would be the sole responsibility of the federal courts to determine whether a work qualified as a work of fine art. Copyright registration would not be a significant factor in this determination.

The definition of "work of fine art" appears to be an important component of S. 1619 because strong moral rights provisions attaching to all pictorial and sculptural works regardless of quality could be overly stringent. The Copyright Office believes S. 1619 does a good job of defining "work of fine art."

3(b). How should the U.S. Copyright Office deal with the likely influx of amateur artists who seek to have their works registered?

Answer: Under the resale royalty system of S. 1619, an artist must register as an author with the Copyright Office in order to be entitled to resale royalties. The artist is not required formally to register his or her works. The statute does not impose any preconditions on the right to name registration, and the Copyright Office does not plan to impose any such condition other than perhaps an affirmation that the person has created a work of art. Therefore, any artist who thought he or she might someday be entitled to a resale royalty could register his or her name in the Copyright Office.

There is a likelihood that many of the registered artists may never be entitled to a resale royalty. Only a relatively few works will satisfy the qualifying minima. However, as long as artists pay a registration fee to cover the costs of the Copyright Office, the

Copyright Office sees no problem in handling whatever volume of registrations there may be. The filing procedure would be very simple and the records could be automated.

3(c). Aren't we just creating a situation for a volume of litigation?

Answer: Any statute creating new rights will likely produce some additional litigation, at least at first. The most important public policy consideration is whether the terms of the statute are sufficiently clear to allow the courts to develop clear standards on a case-by-case basis. Most citizens are law-abiding, and ~~if~~ standards of conduct are reasonably clear, the incidence of compliance will be high. The Copyright Office believes the terms of S. 1619 are sufficiently clear to allow courts to develop clear standards without an unusual amount of litigation.

Three states have statutes protecting the moral rights of artists: Calfifornia, New York, and Massachusetts. California's statute has been on the books for over ten years. Litigation has been sparse.

California additionally has had a resale royalty statute on the books for ten years. The Copyright Office is unaware of any state action being brought under this statute, since the Ninth Circuit in Morseburg v. Balyon, 621 F.2d 972 (9th Cir. 1980) held the California statute was not preempted by the 1909 Copyright Act.

Senator KENNEDY. Thank you very much.

Well, you raised some good questions. We will have opinions on those matters during the course of this hearing; we will have some diversity, actually, in the expression of those opinions, but we will try and establish a record on the issues.

Let me ask, for the record, if the bill is actually passed as introduced, if you can give us some idea about how easy or how difficult it will be for its Copyright Office to accommodate its requirements?

Mr. OMAN. The way they are described in the bill, Mr. Chairman, it would be a rather simple undertaking. There is no judgment call required. It is the purely historic function of the Copyright Office, which is to act as a register, like the register of wills, to just serve as the depository for the information without any judgment calls involved, so I think we could do the job quite easily.

Senator KENNEDY. And you are satisfied that, if it were enacted into law, the burdens of compliance by regulations and paperwork would not be excessive?

Mr. OMAN. No. I think that it is entirely manageable, and with the installation of computers in the Copyright Office over the past few years, I think it would be a matter quite simply accomplished and quite easily used by the people who require the information.

Senator KENNEDY. You have suggested taking care of moral rights as part of the Berne Convention legislation. I don't believe the moral rights legislation is necessary to join Berne. Do you disagree?

Mr. OMAN. The Ad Hoc Committee on the Berne Convention, which was organized by the Department of State, concluded that in fact no specific moral rights legislation was required. The access to the common law, the Federal trademark laws and the fair trade laws, all would be available to the creative people to protect their rights as required by the Berne Convention.

But certainly the issue will be debated fully in both the House and the Senate, and I suspect that it will have a bearing on the provisions of your bill. It may become clear that in fact what you are seeking to achieve expressly is already available in large part under the current law.

Senator KENNEDY. Well, the bill actually statutorily creates moral rights for a rather limited group of artists, and I just don't know that it is necessary to link it to Berne necessarily.

Mr. OMAN. I must say the historic basis for moral rights, in terms of the work product of the artist being something that is very personal, on the theory "to every cow her calf," is much more poignant and persuasive in the fine arts area than it is in the whole gamut of works covered by the copyright law. Certainly there would be an argument made that this is where you really need a strong statement of protection of moral rights, and I suspect that argument will be made.

Senator KENNEDY. Well, the bill addresses a unique area of the visual arts. We know that there are a lot of other issues regarding moral rights and work for hire which are complex and difficult, and which should be thought about and examined at some time, but it is my sense which, I believe, Senator Kasten and others share, that the usual artists are a very special group that has rather special and significant needs. There is a compelling and urgent need to address those particular questions.

I want to thank you very much. We will call on you as we move through this process. You have been very helpful to this committee, not only as a witness, but also when you worked very closely with Senator Mathias in this area as well. Your expertise is widely recognized, so we are grateful for your comments and your testimony. It is very helpful to us. Thank you very much.

Mr. OMAN. Thank you very much, Mr. Chairman.

Senator KENNEDY. Next we have a panel consisting of Robert Mangold and Ms. Jenny Holzer, if they would be good enough to come forward.

We have a full morning and full panel. I am always reluctant to limit it to precise moments, and we want to hear what you have to say, but if you could be sensitive to the time issue, we would be very grateful. We are fortunate to have both of you distinguished artists here this morning, and I will ask Mr. Mangold if he would lead off.

STATEMENT OF ROBERT MANGOLD, ARTIST, WASHINGTONVILLE, NY

Mr. MANGOLD. Like the poet, like the writer, and like the composer, the painter and the sculptor creates, from his or her sensibility, works that have a particular significance for them. If they do this with integrity and love, it has significance for others as well.

It is this creating, this making visual of the thoughts and emotions, that is the process of art. The paintings or the sculptures are the physical embodiment of this process, the culmination of it.

An artist's body of work is linked from beginning to end, a chain of work ideas that connects their past and their present and the present, connects to society, and connects to their dreams. If we examine this body of work, from the early work to the later work, we will see that it is the artist's continuing achievement that reinforces and makes significant his early efforts.

Single works of art rarely by themselves become more valuable, but they take on more artistic significance and thereby economic value, primarily through the artist's continued efforts to push this creativity to its limits and through his or her ability to keep raising the ante with its risk of failure.

As I said, the painting or the sculpture are the physical embodiments of the creative process. They are sold. It is only the visual fine artist that loses the work in total at this initial stage. Once a work is sold, artists are almost powerless to keep their work from being compromised, abused, destroyed or altered. They do not share in any of the often increasing economic status of the work, even though it is by their continuing efforts that the work is deemed more valuable.

The public's reception of art is always behind the pace of the artist. They are familiar with where you are coming from but tend to be skeptical of where you are going, and that is as it should be. But since the artist's only payment for his work comes only from the initial sale, this again works to the artist's disadvantage financially.

I will give you a specific example from my experience, and it is not an exaggerated or uncommon one in the context of the art world. In 1969, when I had already exhibited as an artist in New York City for 7 years, a painting of mine was sold for $800. The representative gallery where it was exhibited collected a 50-percent commission, which was quite common, leaving me with a total return of $400. Last year this work sold at auction for $80,000.

If this bill had been in place, my royalty payment of 7 percent would have given me some financial reward, many times more than I initially received but still less than the sales tax that New York City would collect on such a sale. The idea expressed by various opponents of this bill that this small but deserved payment would topple a delicate balance, I suggest is ridiculous.

There are artists who have become ill, disabled or merely unable to work; artists who have died and whose dependents cannot benefit from the resale of valued works. If for no other cause than those illustrated here, this bill should become law. I think it is fair and just that a visual artist be allowed a continuing moral and economic interest in his or her work, just as literary and musician artists have in theirs.

Again, an art work exists only because of a single artist's vision. If the artist did not exist, the work would not exist. Unlike the sciences, where things exist in nature waiting to be revealed—if one person does not discover them, sooner or later another will—in art it is different. If Mondrian had not lived, his work would not exist. No one else would have created it. If Matisse had not been allowed to paint, the world would have lost his art.

Art, music, literature exist because of one person's vision and commitment. To ask, then, that the artist eliminate his or her continued involvement in the work because it was purchased by someone is hard to accept.

A nation is judged by its culture. It has a responsibility to protect its culture and not allow the interests of the marketplace to overshadow the interests of its creative people and their art.

Thank you.

Senator KENNEDY. Thank you very much.

Ms. Holzer?

STATEMENT OF JENNY HOLZER, ARTIST, HOOSICK FALLS, NY

Ms. HOLZER. Thank you. I would like to offer a few thoughts in support of the Visual Artists Rights Act. I will concentrate on two areas, the resale royalties and the moral rights portion. I will start with the resale royalties, even though this may be the hot potato in this legislation.

I think this idea is one that is certainly easy to understand and, I think, easy to justify as well. The proposed 7-percent royalty for artists from collectors' gains that are greater than 50 percent of the original sale price would not impoverish the collector but would supply the artist with a little bit of money and a fair amount of recognition for his or her contribution to this whole process.

I don't think it would drive a wedge between the collector and the artist. I think instead it would formalize the existing collaboration between the collector and the artist, in which the artist of course creates the work and then through the rest of his or her career tries to improve, and in which the collector purchases the work and ideally conserves it.

I don't want to overstate the contribution of the artist to the value of a work of art but it is clear, as Robert Mangold said, that the art work wouldn't exist if the artist didn't make it, and there would be nothing to either sell or resell if the artist hadn't made a good piece to begin with. In addition, it is the artist's continued efforts at improving himself or herself that makes a work increase in value. When the public recognizes these efforts, this is what makes a work go up in price.

Artists often do receive a nominal amount of money for the initial sales of their work, especially early in an artist's career. To date, this initial sale has been the only compensation for any artist. In many cases it is the early work of an artist that eventually becomes the most valuable.

Sometimes an artist's concerns and those of society converge, and this is the work that is treasured. There are numerous examples of work that has originally been sold for a few thousand dollars, and the artist has lived to see these works resold for tens of thousands, hundreds of thousands, or in some cases millions of dollars.

I can think of a few examples of how royalties cumulatively could benefit the artist and still not hamstring the collector. There is the instance of an artist whose early work has proved to be the most expensive and whose current work perhaps is not selling at all or is selling infrequently and very cheaply.

The resale royalty also could benefit an older artist who will very likely have nothing resembling a pension. The royalty as well could be important for families of deceased artists, families whose standard of living perhaps has been very modest because the mother or the father has been obsessed by art-making as opposed to money-making.

Critics of the resale royalties say that it would benefit a handful of aging, superrich artists. I might be a good example that this is not necessarily so. I am not spectacularly old and not spectacularly wealthy, but already a number of works of mine have resold shortly after their initial sale for more money than the original price.

Finally, I think the most important thing is that the resale royalty would establish a real link between the artist and the work, the art work that has left the studio. For better or worse in this country, money is considered to be absolutely real.

This link or continuing connection between the artist and the art work brings us to the moral rights section of the bill. This bill considers the distortion, mutilation, alteration or destruction of a work to be a violation of the artist's copyright.

I think it is very important, when an artist has completed a work, when the artist has decided that nothing be added or subtracted or changed in any way, that the work be allowed to stand as intended. I don't think it is a ridiculous idea that the artist knows best when something is finished.

I think an altered work or a destroyed work of course is a great loss to the artist, and I think it is a loss to culture as well. Many works, if they are destroyed, are lost irretrievably. Unfortunately, it is not uncommon that works are changed. A famous example and a particularly absurd example is a sculpture of George Segal that consisted of figures placed in a bed. The collector removed the figures from bed, placed them on a pedestal, and left them there.

I know I have had to deflect collectors who want to insert, in the middle of my programs for electronic signs, "happy birthday" messages to their wives. My nightmare has been that this work subsequently would be borrowed for a museum and my work would consist of "happy birthday, darling," "happy anniversary."

I am grateful for another provision in the bill that would allow an artist to disclaim the paternity or maternity of a work that is exhibited publicly, a work that has suffered damage or alteration. This could spare the artist embarrassment and professional damage.

Another part of the legislation that I think is helpful covers work that is affixed to or incorporated into public buildings. This part is especially important for artists who concentrate on public work, who are preoccupied with trying to make work for the public that is intriguing, that is perhaps provocative, and that maybe even gives the public some kind of notion of the sublime. It is very disconcerting when this type of work is destroyed or changed in any way.

To summarize, I think the best thing about this act is that it does make explicit the partnership between the collector and the artist through the resale royalty. The resale royalty does acknowledge artist's contribution to the appreciation of a work within the artist's lifetime. The royalty makes concrete this connection between the artist and the work that has left the studio after a sale, and this connection between the artist and the work is further supported by the moral rights provision that protects the art work from mutilation and destruction.

All of the above are most helpful to artists and, I think, likely to promote the preservation of the art work itself. It is maybe not too romantic to say that artists go as deeply as they can to find what is best in themselves, and then if they find anything good there, they externalize this. The result is the work of art.

This legislation is protection on the national level of this end product of the creative process. It recognizes, I believe, that art is more than a commodity. It is an idea, a hope, a formulation, a resolution. The Artists Rights Act suggests that art is more than a personal possession that someone could perhaps destroy or peddle or trade at will.

Thank you.

[The prepared statement of Ms. Holzer follows:]

STATEMENT OF

JENNY HOLZER

Artist

Hoosick Falls, New York

I would like to offer a few ideas in support of Senator Kennedy's "Visual Artists Rights Act of 1987". I will focus on the two major issues in this legislation: re-sale royalties and moral rights. I will start with the matter of re-sale rights which, perhaps, is the more controversial, but which is easy to understand and, I think, easy to justify.

The proposed 7% royalty for artists from collector's gains that are greater than 50% of the original selling price would not create a hardship for the collector. On the other hand it would give the artist a little money and a lot of recognition for his or her creation of the art work. This royalty should not alienate the collector from the artist. Instead, it formalizes their collaboration in which the artist produces a work which becomes more valuable through the artist's ongoing investigations and production and through the collector's appreciation and conservation.

I do not want to overstate the contribution by the artist to the value of the art work, but it is obvious that there would be no growth in value if the artist had not produced a good piece, and if the artist had not continued to make every effort to improve and develop, and if the artist's efforts were not recognized by the public.

It is generally the case that artists receive a nominal amount of money from initial sales of their work, especially in the beginning of their careers. As it now stands, this initial sale will be the only compensation to the artist for that work. In many instances, it is the early work of an artist that eventually becomes the most valuable - sometimes the artist's preoccupations and those of society converge and only this work is treasured. When this occurs, artists are unable to share in this appreciation and this has not been uncommon in recent history.

I can think of a few examples of how the re-sale royalty, while small enough not to inconvenience collectors, cumulatively could benefit artists. For instance, for the artist whose early work eventually has proved to be the most expensive and whose current work either is not selling or is selling infrequently and cheaply, the royalty could be the only income and the sole source of recognition for his or her achievement. This could be especially important for older artists who probably have nothing resembling a pension. The royalty also could be helpful to families of aged or deceased artists, families whose standard of living has been modest because father or mother has been dedicated to and obsessed by making art.

Finally, the resale royalty would establish a real link between the artist and the art work that has left the studio. For better or worse in this country, money is considered to be the most real and tangible form of recognition.

This link or continuing connection between the artist and the art also supports the moral rights provision. The bill would make the distortion, mutilation, alteration,or destruction of fine art work to be an infringement of the artist's copyright. It is very important for the artist and for society that when a work is completed, when the artist has decided that nothing must be added or subtracted, that the work stand as intended. It is not a wild assertion to state that the artist knows best that a painting needs to be red instead of green or that a sculpture of a man does or does not need a second head. A significantly altered or mutilated work would compromise the artist's reputation and would be a loss to culture. Similarly, a destroyed work is absolutely irreplaceable to the artist and to the world.

I also am grateful for the provision in the bill that lets the artist disclaim paternity (or maternity as the case may be) of a publicly displayed work that has been distorted, mutilated or altered. This spares the artist embarrassment and professional damage.

The legislation covers fine art works that are affixed to or incorporated into buildings. This is especially important to the numerous artists who concentrate on public art works who spend their time creating what they hope is interesting, challenging, possibly entertaining and maybe even sublime for the general public. It is particularly disappointing for the artist when this sort of work is deliberately or carelessly altered or destroyed. My first public art piece met this fate. The project had been approved by and was installed in a major Wall Street bank. The piece included hundreds of cliches - from every possible point of view - about how best to live your life. The bank found one sentence that said, "It's not good to live on credit," and without notice, removed the piece and crumpled it into a janitor's closet. The episode is funny now, but at the time it was a real set-back.

To summarize, the Artists Rights Act makes explicit the existing partnership between collectors and artists though the re-sale royalty provision. The re-sale provision is an acknowledgement of the artist's contribution to the appreciation of work within that artist's lifetime. The royalty also makes concrete the ongoing connection between the artist and the art work. This connection is further supported by the moral rights provisions in the act that protect the art work from mutilation and destruction.

Maybe it is not too romantic to say that artists go as deeply as they can to find what is best in themselves. Then they try to make external what they find. The result is the work of art. This legislation is protection, on the national level, of this end product of the creative process. It recognizes that art is more than a commodity, that it is an idea, a hope, a resolution, an image of beauty and order. The Artists Rights Act suggests that art is more than a personal possession that can be traded or destroyed at will.

Senator KENNEDY. Excellent.

Let me be the devil's advocate here for a moment or two. Mr. Mangold and Ms. Holzer, if an artist is going to be recognized as having a talent and the value of their works is going to increase, why isn't that really enough in terms of compensation for them? Why encumber this whole process and this whole system with a governmental agency, redtape in the museums or galleries, the additional kinds of costs and expenses that may or may not—and that is obviously an open question—discourage the younger artists? Why, since you sold your first painting at a relatively small price a number of years ago and now you are being compensated a good deal more, why isn't that enough recognition? Why put a governmental agency in between you and the free enterprise system?

Mr. MANGOLD. Well, I think one of the problems is that often what we are talking about is early works, and often artists must sell them, really, to survive, or practically give them away. The idea that a large bulk of your work, perhaps the major portion of your work in some cases—in some cases not, but in any case it could be, and an artist never knows that, how long he is going to be creating works that anyone else wants—I think that to say that you wait until the end results of all of this auctioning and reselling somehow drifts back to you, does not seem the way that the creative artist should be rewarded for what is respected and thought of as important.

I think that it is, again, this idea that there are artists who created 5 years of important work, and after that their work tailed off and people are not very interested in it. It is a very sad sight to see this artist at an auction where his or her work is being sold at an enormous price, and where he literally cannot find a gallery at the present time.

So yes, ideally it should work that way. It should work that as your work becomes more popular, then of course as your old work becomes more popular, your new work becomes more popular, but it is not always true because an artist also isn't a stationary thing. An artist has shifting interests, and what he may have been interested in 15 years ago and what is most attractive to the public has passed.

Senator KENNEDY. And the point is that others are being compensated?

Mr. MANGOLD. Yes, sure.

Senator KENNEDY. And that the whole process for that creative work may or may not continue?

Mr. MANGOLD. It may not.

Senator KENNEDY. And all we are talking about is a very limited kind of reimbursement, should the work appreciate by a significant increase of at least 150 percent.

Ms. Holzer, do you have anything more to add to that?

Ms. HOLZER. No. My response would be very similar to Robert's. I think the most poignant example is when only a very small amount of an artist's work is the work that eventually winds up to be expensive, and it is very sad when the artist isn't able to share in this enormous appreciation.

Senator KENNEDY. Let me briefly ask each of your reactions on another issue. I think Ms. Holzer has answered it but perhaps, Mr.

Mangold, you would expand on it. Detractors of the royalty provision say that it would disadvantage artists early in their career and only profit a small number of artists who have no need of protection. We hear that complaint frequently, and I would be interested in both of your own personal reactions.

Ms. HOLZER. Yes. I honestly don't believe that it would impoverish new, baby artists in favor of the few art millionaires. I think that is certainly a matter of conjecture, that this would happen. My own educated guess is, this would not be the case.

Again, I think I am a reasonable example of the fact that the resale royalty is not for a dozen millionaires. It would be useful throughout the art community, and not just as a way of earning money but as a recognition of the artist's place in the entire process.

Senator KENNEDY. Besides the financial remuneration, the continued recognition and identification, you feel, is important to artists?

Ms. HOLZER. Yes. Yes, that you had something to do with this, other than in a very peripheral way.

Senator KENNEDY. Mr. Mangold?

Mr. MANGOLD. Well, I think yes, I am going to answer that as both a collector and a—I mean, I have collected things most of my life and I certainly never thought, when I went to buy something, that a 7-percent sales tax or something like that was going to discourage me. I have many works of friends and things that I have purchased in my house, and I don't think of which ones are more valuable or in that way. I can't believe that a real collector is going to be disturbed by this. Now if in fact it discourages the type of collecting that is only done for an investment purpose, I am not terribly disturbed by that if it does discourage that, since I don't think art is necessarily a commodity and it shouldn't be treated like one.

As far as the early years, in my early experience I spent from 1962 to 1970 and had three or four one-man shows in the city, including in 1971 an exhibition at the Guggenheim, and at that point even with the exhibition at the Guggenheim I was not selling work. You can't keep all your work in your studio hoping that someday, someone will want it, so what happens is, work gets damaged, you give it away, work gets dispersed one way or the other, and in the end you do not get anything back for all of that.

Senator KENNEDY. I imagine for every star artist there once was an emerging artist.

I have a final question on the moral rights provisions—do you believe that this an essential part of the legislation or a tangential one?

Ms. HOLZER. I think both parts are equally important and I would hate to see them separated because I think they reinforce each other. I find the moral rights part particularly interesting and necessary because apparently it is not written anywhere that someone can't buy your work and turn it into garbage, a throwaway. This is, of course, disconcerting.

Mr. MANGOLD. Yes, I think the moral rights are certainly equal to the royalty and the economic part. I think that it is a concern of every artist. I don't know any, whether you make paintings on canvas or whether you make—I have made many paintings that were multiple-paneled pieces that are bolted together and disassembled when they are shipped or when they are sold, and you often wonder whether what is going to happen is what was mentioned in terms of the Picasso piece—if the piece is going to be handed out to five relatives or something, or whether in fact you will ever know about it if this happens, and so on. So there is this idea that you lose total control in a way that I can't for the life of me think of any other art form or artist that has to have the sense that their work could be destroyed or lost completely.

Ms. HOLZER. Or changed significantly, to the point of it being unrecognizable.

Mr. MANGOLD. Not being yours, yes, being hung upside down or whatever.

Senator KENNEDY. Well, thank you very much for your very, very helpful testimony. If we have additional questions, we will be in touch with you. Thank you very, very much.

[Questions and answers of panel, subsequently received for the record, follow:]

SENATOR HATCH'S

QUESTIONS FOR ARTISTS

1. I WOULD CERTAINLY WANT TO SEE ARTISTS ADEQUATELY COMPENSATED FOR ANY APPRECIATION IN THE VALUE OF THEIR WORKS. AS YOU HAVE EXPLAINED WELL, AN ARTIST GETS NO DIRECT BENEFIT FROM THE ENORMOUS APPRECIATION WHICH MAY OCCUR AFTER A WORK IS INITIALLY SOLD. IN YOUR VIEW, IS AN ARTIST COMPENSATED FOR THE APPRECIATION OF HIS WORKS BY THE INCREASED VALUE OF SALES OF HIS UNSOLD INVENTORY? IN OTHER WORDS, WHEN ONE OF YOUR PAINTINGS SELLS FOR AN ENORMOUS PRICE, IS IT TRUE THAT THE REST OF YOUR UNSOLD WORKS SELL AT A HIGHER PRICE AS WELL, THUS GIVING YOU AN INDIRECT COMPENSATION?

2. ART DEALERS, MUSEUMS, AND COLLECTORS CONTEND THAT THE RESALE FEE WOULD HARM THEIR ENTERPRISES AND REDUCE THEIR ABILITY TO SPONSOR DEVELOPING ARTISTS AND TO GENERALLY SPONSOR THE ARTS. IS THERE ANY CAUSE FOR CONCERN OVER THEIR WORRIES ABOUT THE REDUCED ART MARKET?

3. AS I MENTIONED AT THE OUTSET, A COMMITTEE IN ENGLAND DECLINED TO IMPLEMENT THE CONCEPT OF DROIT DE SUITE BECAUSE "IS NOT PRACTICAL EITHER FROM THE POINT OF VIEW OF ADMINISTRATION OR AS A SOURCE OF INCOME TO INDIVIDUAL ARTISTS AND THEIR HEIRS." CAN YOU EXPLAIN WHY OUR SITUATION IS DIFFERENT FROM THAT STUDIED IN ENGLAND?

JENNY HOLZER
R.D.#1 BOX 180
HOOSICK FALLS, NEW YORK 12090

December 21, 1987

Dear Senator DeConcini,

Thank you for your letter of December 9. I am happy to answer the supplemental questions of Senators Grassley and Hatch about the Visual Artists Rights Act of 1987. I enclose my response.

I appreciated the chance to testify before your subcommittee. The moral rights portion of the act and the resale royalty provision would help preserve works of art and artists.

Sincerely yours,

Jenny Holzer

Jenny Holzer

JENNY HOLZER
R.D.#1 BOX 180
HOOSICK FALLS, NEW YORK 12090

December 21, 1987

Dear Senator Hatch,

I will do my best to answer your questions about the Visual Artists Rights Act of 1987.

Question 1

It is by no means automatic that an artist benefits by the appreciation of his or her unsold inventory after the resale of a work of art. I can think of good examples in which the artist receives nothing directly or indirectly from a resale. Often only one or two bodies of work from an artist are marketable. The resale of a work from a "good" or saleable series has little or no effect on the price of a work from a less popular or less fashionable period. Frequently, too, it is the early works of an artist that are most highly valued. Typically, all this work has been sold long ago for very little money. Few artists are vain enough to reserve early pieces on the off-chance that they'll be famous. Not many beginning artists can afford to hold back art works even if they are unusually optimistic about the work's future value.

Because there is no guaranteed indirect benefit to artists from resales, the direct compensation from the resale royalty is necessary. Otherwise the artists are excluded from the resale of work while dealers, art advisors, collectors and auction houses profit. I see little justification for the idea that somehow the artist is, and should remain, peripheral to this process.

Question 2

I would observe that museums, art dealers and collectors tend not to sponsor developing artists, but sell, exhibit and buy established artists. Young artists support themselves for the most part. I am not aware that museums uniformly are opposed to the Visual Artists Rights Act. Collectors may be reluctant to share profits gained from resales with the artists, but I don't believe that a resale royalty would slow collecting. Collectors buy for many more reasons than speculation; they are [illegible] art, they enjoy the art world, or they may want [illegible] ection that eventually will be given to a museum.

in their memory. Collectors who only buy to profit are rare and generally are not helpful to the art world. Collectors often are very wealthy people whose "ability to sponsor the arts" does not and should not depend on denying artists a resale royalty. Some dealers have objected to the resale royalty, but I am afraid that their objections are based not on concern for developing artists, but on a fear that collectors might ask them to accept a smaller commission for resales to offset the proposed artist's share. I believe that the booming art market easily can accomodate the modest royalty for artists and still support all other interested parties.

Question 3

I am not familiar with the English committee's reasoning and with the particular pressures on them, so I cannot comment on their decision. However, I believe that the U.S. Visual Artists Rights Act would be relatively straight forward to administer. The representative from the Copyright Office testified that their new computers would easily realize the registration of artists and that modest fees would cover the costs of registration. I think I am correct in stating that the responsibility for initiating any action provided for by the Act rests with the artists and thus does not require major efforts by the government. About the Act not providing a "practical... source of income," I can think of two instances where the resale royalty would provide much-needed money for artists. The royalty would give money to the families of deceased artists, families who often have had a modest standard of living because a parent has been making more art than money. Another example would be an older artist whose only saleable work is a series from his or her youth. This artist would have no sales income other than that from resale royalties from the early work. This sort of very real income for artists could be achieved as efficiently and as matter-of-factly as royalties collected for songwriters.

Thank you for this chance to give you my ideas. I think that the moral rights portion of the Act and the resale royalty provision combine to offer protection to works of art and to help support artists. I am grateful for both.

Sincerely yours,

Jenny Holzer

Jenny Holzer

QUESTIONS RE S. 1619
SENATOR GRASSLEY

1. ISN'T IT POSSIBLE THAT AN ARTIST CAN SELL HIS WORK CONDITIONAL UPON THE REQUIREMENTS THAT

   A. THE BUYER NOT MODIFY THE ART WITHOUT THE ARTIST'S PERMISSION?
   B. THE BUYER, WHEN HE RESELLS THE WORK, PAY A ROYALTY TO THE ARTIST?

   IN OTHER WORDS, WHY SHOULD CONGRESS LEGISLATE WHAT INDIVIDUAL PARTIES IN A FREE MARKET CAN ACHIEVE BY PRIVATE AGREEMENT?

2. ON THE ROYALTY ISSUE: ASSUMING THE MARKET VALUE OF AN ARTIST'S WORK INCREASES OVER TIME BECAUSE THE ARTIST HAS ACHIEVED FAME OR POPULARITY, AND THAT THE ARTIST'S LATER WORKS ARE COMMANDING A HIGHER PRICE THAN HIS EARLIER WORKS, THEN WHY SHOULD THE ARTIST BE ENTITLED TO REAP AN ADDITIONAL PROFIT FROM A BUYER WHO TOOK A CHANCE ON THE "UNKNOWN" ARTIST BY BUYING AN EARLIER-PRODUCED WORK AT A LESSER PRICE?

3. ON DEFINING A "WORK OF FINE ART:" AT WHAT POINT SHOULD SOMEONE'S CREATIVE WORK BE ENTITLED TO THE PROTECTIONS OF THE BILL?

   HOW SHOULD THE U.S. COPYRIGHT OFFICE DEAL WITH THE LIKELY INFLUX OF AMATEUR ARTISTS WHO SEEK TO HAVE THEIR WORKS REGISTERED?

   AREN'T WE JUST CREATING A SITUATION FOR A VOLUME OF LITIGATION?

JENNY HOLZER
R.D.#1 BOX 180
HOOSICK FALLS, NEW YORK 12090

December 21, 1987

Dear Senator Grassley,

Thank you for the opportunity to give you my thoughts on the Visual Artists Rights Act of 1987. I will try to answer all your questions.

Question 1

While theoretically it is possible for an artist to sign a contract with a collector providing for resale royalties and prohibiting the alteration or destruction of art work, it would be almost impossible to achieve in the "real world". Typically, an artist is broke and very eager to sell a work, especially early in his or her career. (Often it is just this early work that eventually becomes most valuable for resale). The artist in this situation has absolutely no leverage to convince a collector to sign such a contract. Without this contract, the art work is not shielded from mutilation or destruction and the artist is excluded from any possibility of resale royalties. National legislation is what is required to protect the art work and the artist; both are considered to be important elements of this country's culture. The Act helps the artist realize what he or she could not hope to do alone.

Question 2

About some of the assumptions in the question, if the value of a work increases over time it is because the artist has built his or her reputation on continuing hard work. "Fame or popularity" should read "years of labor". Also, one cannot assume that an artist's later works typically command a higher price than early works. It is more usual that early works are the most valuable. There are some cases in which only the early work can be sold and later pieces are ignored by the market. Finally, why should the artist who created the work not share in its resale when collectors, dealers, art advisors and auction house [illegible]ly [illegible] many cases this is not "additional profit"; it is [illegible] [illegible] the artist. S. [illegible] applies just to the works that [illegible] ciated significantly and the artist's royalty is only 7% [illegible] collector's gains over and above the original purchase price. Because the artist's royalty is a small percentage of a large gain, the collector who took a chance still is handsomely rewarded.

Question 3

It is relatively easy to define a work as fine art. The art world has an abundance of experts - curators, critics, dealers - who can certify a work's or an artist's status. The artist's resume consists of education, an exhibition record and lists of articles and reviews by journalists and critics, all of which are tangible evidence of the artist's competence and professionalism. It is unfortunate that art works require the protections of the bill, but too frequently they are subject to alteration and even destruction. The mutilation or the outright loss of art works damages the artist and the nation's culture.

I honestly do not believe that the copyright office will be beseiged by amateur artists. This legislation will be known to, of interest to and applicable to professionals. The witness from the copyright office testified at the hearing that his computers easily could handle the anticipated volume of registration. He also stated that the cost would not be prohibitive and that small fees could prevent any drain on the public treasury.

Litigation is too difficult and too expensive to be undertaken for frivolous reasons. Artists as a group are neither wealthy nor litigious. The bill would provide national guidelines for remedies for major violations such as the alteration or destruction of art works. When a work is compromised and the artist's rights violated, there needs to be an established way to redress the situation.

Again, thank you for you interest in this matter that is so important to art and artists.

BEST AVAILABLE COPY

Senator Dennis DeConcini, Chairman
Subcommittee on Patents,
Copywrites and Trademarks

I write this open letter to the subcommittee in response to questions forwarded from Senator Hatch and Senator Grassley. Since they share similar concerns, I will try to answer these questions collectively in this short statement.

Creative artists, writers, filmakers, musicians, etc. are among a nations' most treasured resources. What they produce represents what a nation is at a given moment in time. How it is percieved today and how it will be remembered in the future has a direct link to the output of of a nation's creative people.

By creating a climate where artists can pursue their ideas unencumbered by censorship or restraints, those who drafted our constitution tried to insure our nation's artistic legacy. To further these rights through S. 1619, a visual artist will be accorded nothing more than the right to see that their works are not misused or altered, and the right to a fair share in any increasing financial value placed on the work; the same rights already accorded to writers, composers and musicians, poets, and film makers.

The artist's rights in relation to his work have been left to chance.

S. 1619 would end the the confusion and lack of legal continuity between the arts.

This protection on a national level is important. State laws addressing these problems have been largely ineffective, since the art market is not localized. Works made and sold in N.Y.C. end up in Los Angeles or in Chicago, etc.

Also, opposing local laws and widely ranging personal contracts drawn up individually by only the more powerful artists would create confusion in the marketplace. It would be practically impossible for younger artists to negotiate for such contracts, thereby insuring that artists could never participate in the rising value of what is very often their most important work; their early work.

An artist may produce work over a long period of time, but it is rarely of even quality or interest. There may be periods of time where the production of work is impossible or it may end completely. An artist may only have a few years of original, powerful work.

In these discussions, it has been my observation that works of art are treated as though they are nothing but commodities. Let us remember that works of art have an innate value: beauty, invention, poetic vision; whatever made them compelling works to buy in the first place, these innate qualities are still there. The collector has the enjoyment of these works, they represent the artist's accomplishment and the collectors' personal taste and recognition, and this is separate from market value.

Contrary to the tone of Senator Grassely's question, an artist is no more trying to "reap an additional profit from a buyer who took a chance" than John Updike is trying to "reap an additional profit" from his publishers for royalties from books published early in his career. Thanks to our nation's copyright laws regarding that media, writers have never been excluded from participating in their works' profits. This has been considered neither "unfair" nor a "disincentive" in the publishing world. Screenwriters, playwrights, composers, poets, all participate in the continued publication or marketing of their works. Why is the visual art world different? Why should the visual artist be subjected to another standard than any other artist?

A balanced , fair national law , as I believe this one to be, with the Copywrite Office acting as a national registry of works is not impractical. But rather it is an historic opportunity to put order and justice into an area in which exploitation has been common, and to bring the visual arts up to nothing more than parity with the other great arts of this nation.

Robert Mangold
December 22, 1987
Robert Mangold

Senator KENNEDY. Our next panel, Mr. John Henry Merryman, professor of law, Stanford University; Mr. Henry Hopkins, director of the Frederick R. Weisman Collection; and Leonard DuBoff, professor of law, Lewis and Clark School. We will start with Mr. Merryman.

STATEMENT OF JOHN HENRY MERRYMAN, PROFESSOR OF LAW, STANFORD UNIVERSITY

Mr. MERRYMAN. Thank you, Mr. Chairman.

My name is John Merryman. I am chairman of the Visual Arts Division of the American Bar Association's Forum on the Entertainment and Sports Industries and Sweitzer professor of law and cooperating professor of art, emeritus, at Stanford University.

I am grateful to the committee for this opportunity to appear before it. I am the first speaker today to express an opinion against the resale proceeds right. I respectfully suggest that the committee delete the resale proceeds right provisions of S. 1619. The problem is with the idea of a resale proceeds right itself. Tinkering with this bill could make it less harmful and less unworkable, but the fundamental problem would remain: Despite its superficial appeal, the resale proceeds right is unsound.

At a celebrated and now legendary auction of contemporary art in New York in 1973, which was captured for posterity in a widely distributed documentary film, a collection of works owned by Robert and Ethel Scull was auctioned. One of them, a painting entitled "Thaw" by the great American artist, Robert Rauschenberg, brought $85,000. The Sculls had bought it some years earlier for $960, according to one account. After the auction there was a celebrated encounter between Scull and Rauschenberg, and since that episode the resale proceeds right has been a militant cause for artists and their sympathizers in the art world.

Why was Mr. Rauschenberg angry at Mr. Scull? It would be wrong to suppose that Rauschenberg did not share in the profits of the Scull sale. At the time of the sale, a number of works from the same period remained in Rauschenberg's studio and at his dealer Leo Castelli's gallery. Their prices were sharply raised the next day. As someone remarked at the time, "The Scull sale made Rauschenberg a millionaire."

Enthusiasts for the resale proceeds right are unaware that the works of most artists, if they have any resale market at all, decline in value. Even major artists sometimes suffer a decline. When several Robert Rauschenberg paintings sold last year in New York at a loss to the consignor, no one seriously suggested that Rauschenberg should reimburse the collector for some portion of the loss, though to do so would be consistent with the logic of the resale proceeds right.

There are hundreds of thousands of artists in America, but only a small handful of successful artists have any resale market whatsoever. Professor Bolch, in the New York Times of November 28, estimated that the total is 50. I would put the number substantially higher, perhaps as many as 400. Whatever the number, they are the only ones who would benefit from the resale proceeds right, since they are the only ones whose works sometimes resell at a higher figure. The remaining hundreds of thousands of living unrecognized artists would get nothing. It is indisputable that the resale proceeds right would make the few successful artists a little more affluent but would pay nothing to the rest.

As a number of studies have shown, one effect of the resale proceeds right is to depress the primary market for contemporary art. The prospect of having to pay what looks to them like an excise tax on resales discourages collectors and dealers from entering and from supporting the contemporary art market. This reduces the flow of money into the primary market for the work of living artists, as well as the resale market.

Even if the total amount of money in the contemporary art market were to remain undiminished, however, the resale proceeds right would distribute more of it to the handful of successful artists like Mr. Rauschenberg and less to the others. It would be Robin Hood in reverse, taking from those who have not and giving to those who have. A few already wealthy artists would get a little more. The great mass of unrecognized artists would get less.

These undesirable results, though not apparent to persons unfamiliar with the art market, are real. The proposition that the right favors the few artists at the expense of the many seems irrefutable.

The experience with the resale proceeds right in jurisdictions that have it is not encouraging. Twenty other civil law nations quickly followed France's lead in 1920 in adopting the resale proceeds right, or "droit de suite," but it actually functions today only in France, Germany, and to a lesser extent in Belgium. The majority of European nations, including the Netherlands, the Scandinavian nations, Spain, and Switzerland, have rejected it. California is the only common-law jurisdiction to have adopted it.

The California resale proceeds right is a small disaster, small only because it is restricted to California and is easily evaded by private sellers and dealers. Sellers now regularly send works to New York or London for auction and buyers go there to buy, strengthening those markets at California's expense.

No other State has followed California's lead. Similar bills have invariably been defeated when proposed in other State legislatures. S. 1619 is the third effort that I know of to enact a Federal resale proceeds right. Earlier bills were introduced by Congressman Fred Waxman in 1977 and by Congressman Fred Richmond in 1981. Neither reached the floor of the House. This unbroken—except for the California anomaly—string of failures is explained, in my judgment, by a simple fact: Those who look closely at the superficially attractive resale proceeds right discover that its attraction is only skin deep. If enacted, it would do substantial harm and little good.

I would like to end on a positive note. S. 1619 contains other important provisions. I applaud and would respectfully urge your support for the proposal to remove the requirement of copyright notice. I also favor the proposal to create rights of paternity and integrity in the artist, and would respectfully urge that you strengthen those rights by removing some of the limiting words in the present bill, and my written submission details that suggestion.

Works of art are part of our common cultural heritage. As you said so eloquently in your opening statement, Mr. Chairman, there is a public interest in their preservation, independent of the artist's interest in his personality and reputation. That public interest would be served by adoption of the moral right.

Thank you.

[The prepared statement of Mr. Merryman, with attachment, follows:]

PREPARED STATEMENT OF JOHN HENRY MERRYMAN

I

My name is John Merryman. I am Chairman of the Visual Arts Division of the American Bar Association's Forum Committee on the Entertainment and Sports Industries, Sweitzer Professor of Law and Cooperating Professor of Art, Emeritus, at Stanford University, and co-author of Merryman and Elsen, Law, Ethics and the Visual Arts (2d ed. University of Pennsylvania Press 1987). My views do not necessarily represent those of the American Bar Association or of Stanford University, but my colleague and co-author Professor Albert E. Elsen, a prominent art historian and activist on behalf of artists, would agree with what I say here.

Teaching and research in art law, frequent association with artists, art historians, collectors and museum professionals, and observing Mrs. Merryman's activity as a private dealer in contemporary art, have exposed me to the American art world. My work as a comparative lawyer specializing in European and Latin American legal systems has exposed me to foreign art laws and art professionals. My position on the resale proceeds right provisions of S.1619 grows out of this background and interest.

II

I respectfully ask that the Commttee delete the Resale Proceeds Right provisions of S.1619. The problem is with the idea of a resale proceeds right itself. Tinkering with this bill could make it less harmful and less unworkable, but the fundamental problem would remain: despite its superficial appeal, the resale proceeds right is unsound. It is bad policy and would make bad law.

The best explanation I have seen of why the resale proceeds right is a bad idea is the statement by Stephen E. Weil, Deputy Director of the Hirshhorn Museum and Sculpture Garden, made at a conference on the Waxman bill in 1977. It is reproduced in ARTnews of March, 1978 and in Mr. Weil's collection of essays, Beauty and the Beasts (Smithsonian Press 1983). Professor Elsen and I have also reproduced it in our book. I assume that a copy of that statement is already in the Committee's record. If not, I ask permission to append a copy to this statement to be included in the record.

III

My explanation of the defects of the resale proceeds right focusses on a highly publicised event in recent art world history.

THE WRATH OF ROBERT RAUSCHENBERG

At a celebrated and now legendary auction of contemporary art in New York in 1973, which was captured for posterity in a widely distributed documentary film, a collection of works owned by Robert and Ethel Scull was sold. One of them, a painting entitled Thaw, by the great American artist Robert Rauschenberg, brought $85,000. The Sculls had bought it some years earlier (for $960, according to one account). After the auction there was a celebrated encounter between Scull and Rauschenberg in which the artist is reported to have said, "I've been working my ass off for you to make that profit...." Since that episode the resale proceeds right has become a militant cause for artists and their sympathizers in the art world.

Why was Rauschenberg angry at Scull? The answer is important, because it explains why the resale proceeds right initially seems so attractive. The large disparity between what he got for the painting on first sale and what Scull got for it on resale appeared to Rauschenberg, and to many others, to be excessive. They believed that the artist who created the work was responsible for the profit. It seemed wrong for Scull to get such a large "unearned" profit from Rauschenberg's work. This apparently reasonable idea requires closer examination.

When Scull bought the painting, he paid the price established for it by Leo Castelli, Rauschenberg's dealer. Mr. Castelli is one of the finest of dealers, widely respected for his fair treatment of artists and extraordinary success in promoting their work. Scull paid the going price. That was what Castelli thought it was then worth. His estimate provided the best available indicator of Thaw's fair market value at that time. When, some years later, the same painting sold at public auction for $85,000, its market value had increased.

Where did the increase in market value from $960 to $85,000 come from? In part, of course, it came from the artist's activity in continuing to create a body of highly regarded work (for which he received increasing prices). But some of that increase was due to Castelli's extraordinary success as a promoter of Rauschenberg's work. Some of it was due to the activities of critics, museum curators and venturesome collectors (like the Sculls), who admired, supported, showed and bought

Rauschenberg's works. Some of it was created by the Venice Biennale, which awarded Rauschenberg its highly publicised first prize for painting. Some of it was due the efforts of dealers who bought and sold Rauschenberg's works on the secondary market. Some of it was due to the auction house, which created the occasion on which so much money would be bid for the painting. Such activities, which made and supported the market for Rauschenberg's art, required the investment of time and money and incurred risk (since most contemporary art declines in value, the occasional success has to make up for frequent losses).

It would be wrong to suppose that Rauschenberg did not share in the profits of the Scull sale. At the time of the sale a number of works from the same period remained in Rauschenberg's studio and at Castelli's gallery. Their prices were raised sharply the next day. As someone remarked at the time, "The Scull sale made Rauschenberg a millionaire." The sale also established a new price level for the artist's subsequent work.

Enthusiasts for the resale proceeds right are unaware that the works of most artists, if they have any resale market at all, decline in value. Even major artists sometimes suffer a decline; in 1986, at a New York auction, several Rauschenberg paintings sold at a loss to the consignor. Some observers blamed the losses on the quality of the works, saying that Rauschenberg had produced them during an uncreative period in his career. (No one seriously suggested that Rauschenberg should reimburse the collector for some portion of the loss, though to do so would be consistent with the logic of the resale proceeds right.)

IV

There are hundreds of thousands of artists in America. All but a handful are unsuccessful; they are not included in major private or public collections and have not received critical recognition. Auction houses don't accept their work, dealers don't want it, and museums are unhappy to receive it as a gift. We can call them "unrecognized artists." Most of them have difficulty selling their work in the *primary* market. Only the handful of successful artists have a *resale* market; Professor Bolch, in the New York Times of November 28, 1987, estimated that the total is 50. I would put the number substantially higher -- perhaps as many as 400. Whatever their number, they are the ones who would benefit from the resale proceeds right, since they are the ones whose works sometimes resell at a higher price. The remaining hundreds of thousands of unrecognized artists would get nothing. *It is indisputable that the resale proceeds right would make the few successful artists a little more affluent but would pay nothing to the rest.*

It is interesting to look a little more closely at how the resale proceeds right would work in practice. A survey of all sales of contemporary art at Sotheby's and Christies in New York, from the Scull sale in 1973 through 1977, revealed that works by only 152 living American artists sold for $1000 or more. The sum of such sales was $7,812,250. Ten of the 152 artists accounted for more than 50% of the total dollar amount, the top five for approximately a third. In fifth place was Frank Stella, with $365,000. Jasper Johns was fourth, with $404,000, Alexander Calder was third, with $495,750, then Willem de Kooning, with

$574,950. In first place was Robert Rauschenberg, with $608,250. [The data are taken from Camp, Art Resale Rights and the Art Resale Market: An Empirical Study, 28 Bull. Copyr. Soc. 146 (1980)]

Successful artists do very well in the United States today. Robert Rauschenberg, Frank Stella and Andrew Wyeth are wealthy men. Andy Warhol left a large estate on his death. Picasso was a billionaire. They have become wealthy in an art market that is extremely effective at promoting and marketing their work. The resale proceeds right might appear to give them some additional income, but it would hurt the art market (a topic on which other, more qualified, people will testify), which is is its source. An additional problem is that any additional benefits they might receive would come at the expense of the unrecognized artists.

V

For the great majority of artists the primary, or first sale, market is the only realistic source of market income. As Mr. Weil and others [Asimow, Economic Aspects of the Droit de Suite, in M. Nimmer, ed., Legal Rights of the Artist (1971); Rottenburg, The Remuneration of Artists, Frontiers of Economics (1975), p. 45; Bolch, Damon and Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 692 (1978)] have shown, one effect of the resale proceeds right is to depress the primary market for contemporary art. The prospect of having to pay what looks to them like an excise tax on resales discourages collectors, dealers and auctioneers from entering and supporting the contemporary art market.

Even if the total amount of money in the contemporary art market were undiminished, however, the resale proceeds right would distribute more of it to the handful of successful artists, like Mr. Rauschenberg, and less to the others. It would be Robin Hood in reverse: taking from those who have not and giving to those who have. A few already wealthy artists would get a little more; the great mass of unrecognized artists would get less. Here are two illustrations of how this regressive system of income redistribution would work.

A. Few dealers who show the work of living artists can survive on that part of the business. Prices on first sales of the work of unrecognized artists are low and gallery expenses are substantial. To stay in business, most dealers are active in the secondary market. They acquire a Rauschenberg drawing from a collector or an estate or at an auction and resell it to another collector, a museum, or another dealer. With the profits from that kind of transaction they can subsidize the "front room" of the gallery, where they show the work of unrecognized artists. If the dealer has to pay part of his resale proceeds to Mr. Rauschenberg, less remains to subsidize the front room. The dealer must put on fewer shows or economize on his promotional activities or go out of the gallery business altogether and simply deal in the scondary market, where the overhead is much lower. The unrecognized artists he can no longer show and promote as often, or as well, or at all, are the losers.

2. The contemporary art market in the United States is the strongest in the world today. It is the medium through which American artists' work is shown and distributed and the artists remunerated. That the resale proceeds right would weaken the American art market and shift it toward London and Zurich seems obvious to me and to other witnesses before the Committee. That would be damaging to all American artists, but it would be most damaging to the great majority who, unlike Rauschenberg, lack an international reputation and an international market.

These undesirable effects, though not apparent to persons unfamiliar with the art market, are real. The proposition that the right favors the few artists at the expense of the many seems irrefutable. Bolch, Damon and Hinshaw put it this way: "The resale royalty law will result in only a small economic gain to a few and an economic loss to many. It should be repealed for the sake of the artists affected."

VI

I add a few words about the experience of other nations and California, who have actually experienced the kind of thing that is here proposed. The resale proceeds right or *droit de suite* was first enacted in France in 1920. Twenty other Civil Law nations quickly followed France's lead (as Civil Law nations commonly did before World War II) in adopting the right, but it actually functions today only in France, Germany and, to a lesser extent, Belgium. The majority of European nations, including the Netherlands, the Scandinavian nations, Spain and

Switzerland, have rejected it. California is the only Common Law jurisdiction to have adopted it.

Even in France, the right applies only to sales at public auction. Dealer sales and private sales are easy to conceal, and the motivation to conceal them would increase if the resale proceeds right applied to them. The French government exempted such sales, thinking it unwise to adopt an unenforcible law.

As originally enacted, the French law required registration of the work of art. The intention was to build up a public register that would be useful for a variety of purposes, including provenance and authentication of works of art. In practice, however, the register did not work, for reasons that reflect the way people are. Some were too lazy or otherwise occupied to register. Others were not interested. Others preferred to avoid the publicity of registration. Others happily registered forged or dubious works in order to give them an air of authenticity, and the register was corrupted.

The Calfornia resale proceeds right is a small disaster, small becuse it is restricted to California and is easily evaded by private sellers and dealers. Sotheby's, which had an active auction house in Los Angeles at the time, immediately suspended sales of contemporary art there. (Sotheby's later discontinued all California auctions and closed its Los Angeles salesroom.) Sellers now regularly send works to New York or London for auction, and buyers go there to buy, strengthening those markets at California's expense.

The Scull sale film and Rauschenberg's advocacy both played parts in California's adoption of the resale proceeds right in 1976. (Jerry Brown was then Governor of our state and signed the bill against the advice of the Legislative Counsel of California, the Director of the California Department of Finance, and his own legislative staff). No other state has followed California's lead. Similar bills have invariably been defeated when proposed in other state legislatures. S. 1619 is the third effort that I know of to enact a federal resale proceeds right; earlier bills were introduced by Congressman Fred Waxman in 1977 and by Congressman Fred Richmond in 1981. Neither reached the floor of the House. This unbroken (except for the California anomaly) string of failures is explained, in my judgment, by a simple fact: those who look closely at the superficially attractive resale proceeds right discover that its attraction is only skin deep. If enacted it would do substantial harm and little good.

VII

I would like to end on a positive note. S. 1619 contains other important provisions. I applaud and would respectfully urge your support for the proposal to remove the requirement of notice on the work to secure the artist's copyright in it.

I also favor the proposal to create rights of paternity and integrity in the artist and would respectfully urge that you strengthen those rights by removing the words "which are publicly displayed" from Sec. 3(b)(1) and the words "which is publicly displayed" from Sec. 3(c)(1). As it stands, the bill could be read to permit anyone to distort, mutilate, or otherwise alter an artist's work, or to claim authorship of it, so long as it is not publicly displayed. For the same reason, I would respectfully urge that the word "destruction" be inserted before the word "distortion" in Sec. 3(c)(1). Works of art are part of our cultural heritage. There is a public interest in their preservation, independent of the artist's interest in his personality and reputation. That public interest would be served by these suggested changes.

********end********

STEPHEN E. WEIL, BEAUTY AND THE BEASTS 210
(SMITHSONIAN INSTITUTION PRESS 1983)

Resale Royalties: Nobody Benefits
(1978)

That American artists should, through their own creative efforts, be able to sustain themselves—and to sustain themselves with greater dignity and more adequate means than many can do today—is not merely socially desirable. It is a national necessity. In an environment that increasingly stresses corporate accomplishment and technical skills, the importance of artists becomes correspondingly greater. They are among the last role models we have of free imagination, transcendent aspiration, and—above all—individual effort and responsibility. Beside whatever contributions their work can make to our accumulated cultural heritage, artists in their own selves are more than ever vital to maintaining the balance of our national life.

Recognizing that artists require a more adequate support system than American society now provides, legislators at both the state and the federal level have shown increasing interest in finding other means to help them. One proposal, strongly championed by a number of artists and by many artists' groups, would do so by the establishment of resale royalties.

To question, as I shall, both the principles underlying this proposal and, regardless of the soundness of these principles, the utility of any legislation that would establish such royalties is to risk being misunderstood as indifferent or even hostile to the well-being of artists. I hope that I am neither, and I would hesitate to raise such questions publicly were I not convinced so strongly, first, that the establishment of resale royalties, far from helping

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artists or having only a neutral impact, would in fact be positively harmful to their interests and, second, that it is critically important that those who wish to help artists take advantage of this current surge of legislative interest by concentrating their efforts on alternative measures that would increase—rather than, as resale royalties threaten to do, diminish—the funds now available for the purchase of contemporary art.

Analogy and image. Underlying the proposal for artists resale royalties are an analogy and an image.

The analogy is to the means by which authors and composers have traditionally been compensated. Implicit is the suggestion that, by reason of their right to receive royalties, these other creative workers enjoy an advantage that visual artists are denied. This was clearly expressed in one of the seminal documents of the present campaign for resale royalties, the Art Proceeds Act proposed in 1966 by Diana B. Schulder in the *Northwestern University Law Review.* Section 2 provided: "Since a painter or a sculptor who creates a unique work of art does not benefit from the fruits of his labors as does an author or composer who derives royalties from the reproduction or performance of the work, this act, by allowing an economic right upon re-transfer, is intended to ensure to artists a parallel benefit."

The image coupled with this analogy is that of a collector who, having purchased a work of art for relatively little, resells it for a great deal more, pocketing the entire profit and leaving the artist, whose effort first created the work and whose subsequent accomplishments may have contributed to its increase in value, with no part of such increase. It is the image of Robert Rauschenberg and Robert Scull in tense confrontation after the 1973 auction at which Scull resold for $85,000, a work for which he had originally paid Rauschenberg less than $1,000.

If the establishment of resale royalties is to be founded upon some sound principle, then, at the outset, two questions must be asked. Is this underlying analogy correct, and does this underlying image—unquestionably distressing in its suggestion of a collector unjustly enriched at an artist's expense—reflect some common situation or only an occasional, albeit highly visible, anomaly in the market?

Painters, poets, and others. Would the grant to visual artists of some continuing economic interest in their work, the realization of which would be dependent on the resale or successive resales of such work, in fact be a "parallel benefit" to the royalty rights now enjoyed by other creative workers? Clearly, it would not. The royalties that authors and composers receive are based on the multiple initial sales of their infinitely reproducible efforts. For each additional copy of a novel printed and sold, the author may receive additional compensation. So may the composer for each additional performance of a musical composition. For that matter, so too may the visual artist who elects to sell additional copies of an infinitely reproducible *image* of a work of art rather than the unique object in which the work itself is embodied.

This is not the case with a resale royalty. In the case of a resale royalty, no additional example of the original work is being brought into being nor is the work itself being put to any broader use. The event that would cause the proposed royalty to be paid would, instead, be the substitution of one owner for another. It would be as if Norman Mailer could claim some further payment for each copy of *The Naked and the Dead* resold in the secondhand book market above the $4 price at which it was originally published in 1948 or as if an architect could claim some share of the proceeds when a house he designed was subsequently resold at a profit. No such right exists today.

What is proposed here, then, is the establishment of a *new* right—one very different from a royalty and one that does not extend naturally from existing concepts of property and ownership. Whether such a special right should be established for artists is a larger, open, and arguable question, but not one that can be answered by a simple analogy to the royalties payable to authors and composers.

Might the establishment of this special right be justified, then, on the ground that the traditional method by which artists have been compensated places them at a disadvantage to other creative workers? It might, if this were so. It appears, however, not to be so. If we exclude such supplementary income-producing activities as teaching, lecturing, or wholly unrelated employment—none of which relates to the question of royalties and some of which normally supplement the art-derived income of most creative individuals—and exclude as well the grotesquely inflated earnings of such mass-appeal entertainers as rock stars or gothic novelists, visual artists would seem to be consistently better compensated for their creative effort than their peers in the other arts.

To make such comparisons is awkward. Real names must be used, and virtually no one will agree with particular comparisons. Nevertheless, if you compared the probable art-derived income of creative individuals of comparable seriousness, achievement, and popularity, how well would visual artists fare? Consider Pablo Picasso in relation to Igor Stravinsky or Thomas Mann; Marc Chagall to Vladmir Nabokov or Béla Bartók; Henry Moore to Benjamin Britten or W. H. Auden; the fifth best earner of the Castelli Gallery to the fifth best earner among the Yale Younger Poets. Make your own comparisons. If you do it fairly, I believe you will find that the earnings of visual artists—no matter how inadequate such earnings may be in themselves or how poorly they may compare with those of individuals outside the arts—are nevertheless consistently above the earnings of those of their peers who are compensated by royalties.

There are reasons why this should be so. That a work of art is traditionally embodied in a tangible, physical object rather than—as in the case of literature or music—expressed through such infinitely reproducible media as words or sounds has more than aesthetic implications. Beyond the fact that their value is influenced—if not largely determined—by scarcity, works of art do not require the same level of demand as do works of literature or music to secure their creators a living. A painting needs no initial market larger than a single buyer in order to be sold. Two potential buyers, by themselves, can provide the basis for a successful auction. A hard-core audience of two hundred faithful collector-buyers might guarantee an artist's livelihood. By contrast, a poet or novelist—able, perhaps, to realize a two-dollar royalty on the sale of each hardcover copy of a book—would require thousands, if not tens of thousands, of reader-buyers to earn any continuing support from the sale of his work.

If this is so—and if the difference in the way in which they have traditionally been compensated has been an advantage, rather than a disadvantage, to visual artists—then we must look elsewhere for some basis by which the establishment of a resale royalty might be justified.

The argument of unjust enrichment. We know that there are collectors who, from time to time, have made a great deal of money from buying and reselling works of art. We know too that some artists whose work has been involved in these transactions feel that they have been "ripped off" as a result. What we do not know, however, is whether this happens very often. That is only the tip of our ignorance. Confining our consideration to works of art by living American artists, we also do not know, for example:

- The annual dollar volume, number, and price level of primary sales (sales from the artist or dealer to a first collector).
- The ratio these bear to the overall market for art, antiques, antiquities, and other competing "collectibles."
- The number of those works sold in the primary market that are ever resold in the secondary market, and the interval between such sales.
- Of the works resold in the secondary market, the number that are sold at more and the number that are sold at less than their initial price and, in each case, the dollar volume involved.

Beyond this, we have only the haziest idea of how many American artists there are for whose work there even is a regular primary market, of how many of these artists also have a secondary market, of how many buyers "collect" art in any significant way, and of how many such buyers ever resell the works they buy.

We remain, thus, stalled at our original question: How common is the situation that provoked the Rauschenberg-Scull confrontation? Is it one that is constantly repeated across the country, with large numbers of collectors reaping "windfall" profits by reselling the work of a large number of artists? Or is the resale market for contemporary art confined largely to the work of a relatively small group of well-known artists whose work is bought and sold chiefly by "blue-chip" collectors?

Certainly, if it proved that some substantial number of transactions were involved, and if there were general agreement that the ability of collectors to reap such windfall profits had within it an element of unfairness, there might be some warrant for adopting national legislation that would impose some additional tax—

which need not necessarily be one payable to artists—beyond the state and federal income taxes to which such profits are already subject.

Even here, though, it would be difficult to know what, except in the most extreme cases, would be meant by a "windfall" or even—always a problem in calculating taxes—what would be meant by a "profit." If, between the time he bought and resold it, the net after-selling-cost value of a painting in a collector's hands increased by no more than the current rate of inflation, was he unjustly enriched? What if the increase just equaled the interest paid on funds that he might have borrowed to purchase the painting in the first place? What if the increase just equaled the expenses incurred during ownership for insurance and/or conservation? What if he bought and sold two paintings by the same artist, profiting as much on one as he lost on the other?

And what if all of these—inflation, interest cost, the expenses of ownership, and offsetting gains and losses—occurred together? While something may be sensed as unfair in a collector buying a work of art for $10,000 and selling it the next year for $50,000, to what extent do we sense it unfair if a painting, or anything else with a secondhand value, is bought for $10,000 and resold for $15,000 some ten years later?

To justify a resale royalty on the basis that it would ameliorate some widespread injustice done by collectors to artists would require considerable information beyond what we now have. Moreover, to achieve acceptance as fair and reasonable, it would require a mechanism more sophisticated than those proposed thus far to determine when, and in what amount, such a royalty might be appropriate. If windfall profits from the sale of contemporary art are, in fact, a substantial problem, that problem should be addressed by some measured response and not by a dramatic gesture that, regardless of any immediate satisfaction it might give, could neither be justified to those it would affect nor be of benefit to those on whose behalf it was made. Frustration and anger, real as they may be, are not a sound basis for national legislation.

The one-way connection. A further argument made in support of resale royalties is that their establishment would give legal recognition to—as well as symbolize—a continuing connection between the artist and a work of art after it had once been sold. In so doing, it would move American law closer to those Continental systems that recognize a *droit de suite,* from which the concept of resale royalties was first derived, as well as a *droit moral.* Their right to receive resale royalties would, in effect, be the "umbilical cord" through which artists would maintain an ongoing relationship with their work.

The justice of this argument fades, however, when we realize how one-sided this ongoing relationship would be. It would not require the artist to bear any part of a collector's ongoing expenses, such as those for insurance or conservation. Neither would it impose on the artist any greater liability than heretofore for the instability or failure of the materials or workmanship he might have employed in his work. Above all, the proposed umbilical cord would only carry gains, carefully filtering out any losses that collectors might incur on the resale of those works to which the artists would otherwise remain connected.

Certainly, no one seriously proposes that the artist—or the artist's heirs for fifty years after death—should be liable for a refund of five percent of the initial purchase price whenever a collector is unable to resell a work of art for the amount it originally cost. For many artists, the contingent liability might well exceed their total worth. At the same time, however, it is difficult to accept as just a proposed form of partnership in which one of the partners would bear all of the risks while the other enjoyed the luxury of sharing in profits only.

Art in a commodity market. To all of the foregoing, it may in some fairness be replied: so what? If resale royalties would, in reality, benefit artists generally, that fact alone, regardless of any infirmity in the supporting arguments, might be reason enough to consider their establishment. As I said at the outset, however, I have come to believe exactly the opposite: that resale royalties would be neither of any benefit nor even neutral in their impact but would in fact do enormous harm to the already not-very-well-being of contemporary artists.

Unpalatable as it may be to many, works of art—once out of an artist's hands—become commodities. They are articles of commerce. As such, the prices at which, and the numbers in which, they are bought and sold in both their initial and resale markets are influenced by those same considerations that affect the level of prices and sales of any commodity in any market.

No matter how else it may be characterized, a resale royalty would function as a tax. As a tax, it could—as we know from long experience with other taxes—substantially influence the behavior of those to whom it applied. If contemporary art were as much a necessity for collectors to buy as it is for artists to make, this might not matter. Unhappily, though, no matter how bravely we proclaim "ya gotta have art," nobody "gotta" have art, and especially contemporary American art.

If contemporary works of art are to be the subject of a discriminatory tax—one that would not be equally applicable to such alternative "collectibles" as nineteenth-century American art, twentieth-century European art, contemporary crafts, Ming vases, shares of IBM, or condominiums in the Bahamas—there is every reason to believe that some number of collectors would choose alternative investments. Ironically, these would most likely be those very same collectors who most distress artists by considering works of art primarily for their investment possibilities rather than as a personal commitment. Without greater knowledge of the art market, we do not know what this number and their impact might be. What we do know is that to impose a greater tax on one commodity than on another that can readily be substituted for it is to alter the pattern of demand and that, in any market, a reduction in demand must inevitably be followed by a reduction in either or both the level of prices and the volume of sales.

As it is, contemporary works of art are, for the most part, poor investments already. While some may increase in value, the greater number can never again be resold for what they initially cost. Those that do increase in value must increase substantially before any significant return can be realized. Unlike securities, for example—on which a stockbroker's commission may be less than 1 percent—the expense of reselling a work of art through a dealer or at auction will often be 15 to 25 percent. To this, before a profit can be realized, must be added any intermediate costs of ownership: insurance, conservation, and shipping. A security that increases in value by 20 percent can, on resale, yield its owner a profit. A work of art that increases by only the same amount will more likely yield its owner a loss. And, unlike a security, neither such loss nor any intermediate cost of ownership is generally deductible for tax purposes.

Into this already fragile situation, the resale royalty would introduce a further disincentive. Its impact—if calculated on the basis of gross proceeds rather than, as in the case of an income tax, on profit alone—would be far greater than the generally proposed figure of 5 percent at first suggests.

Assuming an average expense of 20 percent, a collector cannot—even before any resale royalty—resell a work of art for less than 125 percent of its original purchase price without incurring a net loss. By adding a resale royalty of 5 percent of gross proceeds, the minimum breakeven point would rise to 133 percent. In the case of a painting bought for $10,000 and resold for $13,000, leaving a net of $10,400 after the payment of expenses, the collector—his remaining profit having been already wiped out—would have to pay a substantial portion of the $650 resale royalty directly from his own pocket.

As resale prices began to exceed 133 percent of the original purchase price, the impact of the royalty, while no longer confiscatory, would still remain high in comparison to other taxes. Thus, if the same painting were sold for $14,000, the resale royalty—$700, to be paid out of the net profit of $1,200 remaining to the collector after expense—would equal an income tax of 58 percent. If the painting were resold for $20,000, the royalty of $1,000 would—after deducting expenses of $4,000—still equal a tax on this profit of more than 15 percent. Even with a three-times appreciation—the original $10,000 painting resold for $30,000—the royalty, calculated on gross proceeds, would equal a tax of more than 10 percent of the net profit remaining after the cost of sale. Beyond this, the collector would still, of course, be required to pay state and federal income taxes on whatever remained.

To make contemporary American art so disfavored an investment can only affect the level of demand in its primary and secondary markets. While diminished demand might initially affect volume, it would sooner or later be reflected in prices as well. If the prices and sales of well-established artists were the first to weaken, then those of almost-as-well established artists would inevitably follow. The process would continue until it affected the sales and prices of the least established of all.

Less now, more later? Acknowledging that the market might be thus affected, some proponents of resale royalties have argued that artists would nevertheless make up, and ultimately surpass, any initial depression in their primary selling prices by the resale royalties they would earn in later years. Surely, there are some who might: the well-established artists, those with regular resale markets and, for the most part, substantial primary markets as well.

For the greater number, though—the 90 or 99 out of every 100 whose work never increases substantially in value, who may have no resale market at all, and who might far better be the focus of legislation intended to benefit artists—no subsequent royalties would make up for this initial deficiency. In the end, what the establishment of a resale royalty would do is what most regressive legislation does: the rich might—or might not—get richer, but the poor would certainly get poorer. As Monroe and Aimée Price concluded in their 1968 *Yale Law Journal* article analyzing the distribution of benefits under the comparable *droit de suite* legislation in France: "to those who have shall more be given."

When gross sales proceeds are used as the basis for computing royalties, this balance is tilted still further—to those who have the most shall the most be given. Artist A, young and unknown, sells a painting for $1,500. Several years later, primarily as a result of A's steadily growing accomplishments and reputation, the painting is resold for $15,000, a tenfold increase. At five percent, Artist A will receive a royalty of $750 to add to the $1,500 he received on the original sale. Artist B, mature and well established, also sells a painting. The price is $18,000. After the same several years, it too is resold. The price is $20,000, a moderate increase reasonably attributable to the intervening inflation. Artist B will receive a royalty of $1,000 to add to the $18,000 that he received on his original sale.

Results such as these are inherent in the gross proceeds formula. They make an awkward fit with the argument that justifies the establishment of resale royalties as rectifying an injustice done to artists when collectors sell their work at very large profits. In fact, the artists who already have the strongest primary markets, and generally the strongest secondary markets as well, would be those likely to benefit the most from this formula. For them, only a moderate percentage increase on resale would be necessary to trigger a substantial royalty. For newly established artists, a manyfold increase might not bring them nearly as much.

Alternatives. The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work—not such abuses as may occur in the resale market. What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase these funds, but, at best, would merely redistribute—ostensibly from collectors to artists but, as a side effect, also from the less-established to the better-established artists—some portion of the inadequate funds already in the market. At worst, by imposing a discriminatory tax on contemporary art, it would reduce such funds.

In Europe, where it originated, the resale royalty has not produced any substantial returns for the great mass of artists. In some countries it has been rejected, in others it is unenforced, and, at its best, it favors only a few. In California, the resale royalty established last year [1977] has thus far served only as a divisive element within the art community and has produced virtually no tangible benefits for artists.

Given the limited, and possibly transient, attention that Congress can focus on this problem, it would be far bolder and more productive if artists and those who would help them channeled their energies behind legislation that would have an effect exactly opposite to that to be expected from royalties—that would increase, rather than diminish, the potential funds available for the purchase of contemporary art.

Most effective would be legislation that, instead of making art a less favored form of investment, would do just the contrary and give it a special and favored status. That is a route that other special-interest groups have taken with advantage. There might, for example, be a provision parallel to the present Section 1034 of the Internal Revenue Code, which defers to a later time any capital gains tax otherwise payable on the sale of a taxpayer's residence provided that the proceeds realized are used to purchase a new residence. By giving collectors an incentive to use the entire proceeds from the resale of a work of art—both their initial investment and any profit realized—to purchase additional works of art, substantial additional moneys could be brought into and kept in the market for contemporary art.

Such a provision could include many refinements. It might limit qualifying new purchases to the work of living American artists. It might require that all such purchases be made directly from artists and not in the secondary market. To benefit a broader group of artists, it might require that no single purchase could exceed some particular price or some particular portion of the amount to be reinvested. Whatever the formula, the object would be to provide an incentive for recycling back into the market—and thus back to artists—100 percent of the funds invested in every kind of art, ancient and modern, domestic and foreign—and not merely 5 percent of the resale proceeds from contemporary art.

Another alternative that has been suggested is the establishment of an art bank similar to that which now exists in Canada. Should an art bank be considered desirable, there is no reason why it need be, as some have suggested, connected with—or financed through—resale royalties. While no one has yet estimated what level of funding would be necessary to establish, supervise, and enforce a nationwide resale royalty, it must be considerable. Instead of using these funds to provide more jobs in Washington, why could the same funds not be used as the initial capital for an art bank? Its benefits could flow to artists immediately—not in five or ten years hence, as would be the case if resale royalties were to be used for its financing. Moreover, such funds would be "new money" in the market—not, as would be the case if an art bank were financed through royalties, simply a redistribution of the funds already there.

"Percent for art" legislation has only recently begun to receive the stronger backing that it deserves. Where it does not yet exist, it can be brought into being. Where it already exists, there may be the possibility of seeking higher percentages. At the federal level, Representative Gladys Spellman of Maryland has taken this course with the introduction this past summer of H.R. 7988, which would require the General Services Administration to double to 1 percent the percentage of construction funds to be used to commission or purchase works of art.

One enormous advantage of "percent for art" legislation is that it can coexist at the federal, state, county, and municipal levels. In some local jurisdictions, substantial percentages have been achieved. San Francisco has established a 2 percent rate, Miami Beach has a 1½ percent rate, and a 1 percent rate will become effective in Colorado this coming July [1978]. Above all, legislation of this kind at the local level offers the broadest group of artists not only the possibility of improving their livelihood through the sale of their work but, beyond that, the opportunity to see their work woven into the public fabric of the communities in which they live.

Whether these or other devices, alone or in combination, represent the best possible approach, what they share is the purpose of increasing the demand for contemporary works of art by injecting into the market new funds that could be channeled toward their purchase. Rather than serving to divide, such measures could enlist the enthusiastic support of all elements within the art community and, in the most practical way, offer what artists presumably want most from any legislation passed on their behalf: an increased opportunity to earn dignified livelihoods through their own creative efforts.

In the end, we would all be the beneficiaries.

Senator KENNEDY. Thank you very much.

I want to recognize the presence of a good friend, the Senator from Vermont, Senator Leahy, who has been very much involved in the issues of copyright. If the witnesses would withhold for a moment, I would recognize the Senator for whatever comments he would like to make.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you very much, Mr. Chairman. We are in a markup downstairs in the Appropriations Committee. Like every Senator, I always have three or four things going. I do have a statement that I would like to have placed in the record, but I want to commend you for introducing the Visual Artists Rights Act.

As an avid photographer, I know the amount of work that goes into creating an original work. Also I think I can understand at least in a small way the artist's attachment to a work after it leaves the easel or the darkroom or the studio.

I just hope that after Judge Kennedy's confirmation—no relation to Senator Kennedy, I should hasten to add, that was the biggest hurdle that Judge Kennedy had to overcome at the——

Senator KENNEDY. We don't want him to get there on the basis of a famous family name.

Senator LEAHY. There you go. [Laughter.]

That was probably President Reagan's first reaction: "Is he related or isn't he?" Anyway, after his confirmation hearings I think life may get a little bit more normal around the Judiciary Committee.

I am going to be encouraging the chairman, once we get back to normal, to put at the top of the list, the bill to bring U.S. copyright law into full compliance with the Berne Convention. I hope we can have a hearing on that soon after we return from our Christmas recess. That should be coming forward. We need to strengthen worldwide protection of the works of American creators by joining the Berne Convention. We need to also consider moral rights issues. I think we can go forward on both of those issues.

Mr. Chairman, I commend you on that. I would ask that my whole statement be made part of the record. I apologize for not being able to stay, but this has been a long-delayed markup in Appropriations and unfortunately I have to go back to that.

[The prepared statement of Senator Leahy follows:]

STATEMENT OF SENATOR PATRICK LEAHY
ON THE VISUAL ARTISTS RIGHTS ACT OF 1987
DECEMBER 3, 1987

The world's appetite for American books, movies, paintings, sculptures and other creative works seems to be insatiable. In fact, demand for these materials makes us the world's leading exporter of copyrighted materials.

Our system of copyright law plays an important role in bringing to the world's consumers this creative cornucopia. But none of it would be possible without the skill and imaginativeness of American artists and other creators. This subcommittee has a special responsibility to them.

I want to commend Senator Kennedy for his initiative in introducing the Visual Artists Rights Act. As an avid photographer, I know how much effort goes into creating an original work. I also understand an artist's sense of attachment to the work, even after it leaves the darkroom, easel or studio.

While I commend the chairman of the subcommittee for convening this hearing, I want to mention another initiative that is crucial to the world-wide protection of the rights of American creators: the move toward U.S. adherence to the Berne Copyright Convention. Legislation to enable the United States to join Berne should be our top copyright priority in this Congress. Nothing we can accomplish would be more important to the well-being of the American creative community.

Berne is the oldest, strongest and most effective international mechanism for protecting copyrights in the global marketplace. Congress has a constitutional mandate to protect intellectual property, and the nation has a great stake in our fulfillment of that mandate. However, our efforts are handicapped because, alone among our major trading partners, the U.S. is not a member of the Berne Convention.

American creators face new challenges in protecting their works against piracy and other threats. Berne has the adaptability to respond to technological advances and other changes that affect a creator's ability to control his work. But when the nations of the world sit down to discuss these matters, American artists are not represented because the United States is not at the table.

Mr. Chairman, after Judge Kennedy's confirmation hearings, life may get back to normal around here. When we make plans for the next session of Congress, I encourage you to put Berne at the top of the list. My bill to bring U.S. copyright law into full compliance with Berne standards is pending before this subcommittee. I look forward to participating in a hearing on this bill soon after we return from our Christmas recess.

Finally, I agree with Senator Kennedy's assertion that the issues raised by the Visual Artists Rights Act should be considered separately from Berne. These issues are important. Congress needs to look into whether the rights of creators are in balance with the rights of other participants in the commerce in copyrighted works. But the record is clear that no changes in legal protections for artists' rights are needed in order for the U.S. to join the Berne Convention.

It is long past time for the United States to strengthen worldwide protection of the works of American creators by joining the Berne Convention. Let us not delay this goal any longer by bringing into the Berne debate the complex and sometimes emotional issue of artists' rights. I commend Senator Kennedy for his perspective on this question, and look forward to learning more about his artists' rights legislation.

Senator Kennedy. I want to thank you very much.

Senator Leahy has pointed out, I think, a distinction between the Berne Convention legislation and the Visual Artists Rights Act. Certainly the Berne Convention is something that I am hopeful we in the committee can address, and I want to work very closely with the Senator from Vermont on that endeavor.

I would agree with him these may not be issues that appear on the front pages of the newspapers across this country but they are, nonetheless, no less important in many respects than a great percentage of our endeavors in this body. I will look forward to working with him. We are fortunate to have good bipartisan support in these endeavors and we are hopeful that we will be able to move forward with this legislation and to working with you.

We hope you will be able to stay as long as you can. We have a very interesting panel here with a good diversity of views—some of the most knowledgeable writers, collectors, and museum directors, as well as creative people themselves. Whatever time you can spare us we would welcome, but we understand that you have important business elsewhere.

We will go to Mr. Hopkins, if you would, please.

STATEMENT OF HENRY HOPKINS, DIRECTOR, FREDERICK R. WEISMAN FOUNDATION OF ART

Mr. Hopkins. Thank you, Senators and committee.

I am Henry Hopkins, the current director of the Frederick R. Weisman Foundation Collection, former director of the San Francisco Museum of Modern Art, and I have had a long career in the arts. Gentlemen, I am here to testify in favor of the purpose of Senate bill 1619, which seeks to amend the copyright law to secure the rights of authors of pictorial, graphic and sculptural work to prevent the distortion, mutilation or the alteration of such works; to provide for resale royalty; and for other purposes.

Having worked for 30 years as an art educator, dealer, curator, museum and foundation director, I have witnessed innumerable instances where the creator of a work of art has been denied what would appear to be just compensation at the time of resale; he has not been consulted concerning the reproduction of his work for commercial purposes; and he has had his work presented in a manner inconsistent with its intended purpose. Senate bill 1619 goes a real distance toward correcting these injustices at a financial level but, most importantly, it begins to return the art world thinking back toward the artist, the special nature of the creative act, and the result of that act as a work of art rather than as a commodity.

There is need for Federal legislation which will establish an equitable and fair pattern for artists' royalties and moral rights at a national level, thus overriding the less than perfect legislation existing in States such as California, which chose to go it alone. It is possible, as John Merryman suggests, if not probable, that California's law may have created a negative economic impact in one or two instances.

There is the rumor that Sotheby's auction house, then doing auctions in California, chose not to continue auctions in California because of the resale royalty law. My own personal opinion on that is that Sotheby's was not doing enough business in California to justify their being there, and they used that as a convenient excuse to leave. A national law, however, would require a Sotheby retreat beyond the Nation's borders, which seems to me unlikely.

I have read the opposition to this bill by art dealers and by auction houses, contending that a 7-percent royalty on an over 50-percent profit would damage the art market. These same concerns were not voiced a few years ago when all of the major auction houses imposed a 10 percent buyer's premium on the total price of any object purchased at auction—a figure well in excess of $4 million on the recent Van Gogh "Irises" sale.

Nor did dealers talk of their 50 percent take on any work of art produced by their house artist and sold by these dealers. Both Bob Mangold and Jenny Holzer mentioned this. That percentage was established when it was extremely rare for a work of a living American artist to sell for $50,000. Surely this percentage should be adjusted downward in favor of the artist in today's ebullient art market.

I am certain that there are hundreds of secondary considerations with which to consume time and energy and to prevent the passage of this bill, but the real issue to me is a very simple one. I ask you, isn't it beyond all reason that the collector and the dealer should benefit financially from the product of an artist's hand on into infinity, when the creator himself is cut out after the original transaction? The issue is not one of right of ownership. The issue is one of tempering our tendency toward immorality and greed.

Even so, in my mind the bill is not perfect, and I have two reservations. I feel that the royalty floor, already increased from $500 to $1,000, should be raised to at least $2,500. This would leave young and emerging artists unaffected, since many of them have voiced concerns that this would create an uninteresting environment for dealers in a relationship with young artists. This new floor of $2,500 would leave them unaffected until the value of their work reached a level where dealers would not be concerned about representing them.

I am also very concerned about the language in the moral rights section and the subjective nature of "what is a work of art," and even more importantly, "what is intentional or grossly negligent conduct." I feel that even the stronger language—and I understand it has been changed to be stronger—is still so open to interpretation that an artist's life savings could easily be consumed in attorney's fees trying to prove a point. Equally, I can see endless court cases pitting museums, corporations, individual collectors and galleries against artists, when the very essence of this bill is to bring those disparate forces into some feeling of harmony with an umbrella of good and equitable law to comfort them. The language needs to be as tight as possible, with little room for interpretation.

This bill, small in the grand scheme of things, is nonetheless important since it provides an opportunity for the art world to rethink its priorities and to bring the artist back to a primary position in determining the future of art.

Thank you.

Senator KENNEDY. Thank you.

We will go to Mr. DuBoff. I would point out that just with regards to possibility of litigation—you can never halt lawsuits, but there is an inclusion in the legislation for reimbursement of attorney's fees with appropriate discretion there. That's about the best we can do on it, but I think you may have a good point.

Mr. HOPKINS. Thank you.

Senator KENNEDY. Mr. DuBoff?

STATEMENT OF LEONARD DuBOFF, PROFESSOR OF LAW, NORTHWESTERN SCHOOL OF LAW, LEWIS AND CLARK COLLEGE

Mr. DUBOFF. My name is Leonard DuBoff. I am a professor of law at the Northwestern School of Law at Lewis and Clark College in Portland, OR. I am also a practicing attorney, of counsel to the law firm of Joseph, Babener & Carpenter in Portland, OR.

I am the founder and past president of the Oregon Volunteer Lawyers for the Arts; founder and past chairperson of the Association of American Law Schools Section on Law and the Arts; a member of their current executive committee; program chairperson for that organization. My views will not reflect either organization's views.

I am also the author of the "Deskbook * * *"——

Senator KENNEDY. We are going to tip that mike up a little bit. There we go. Perfect.

Mr. DUBOFF. Thank you.

I am also the author of the "Deskbook of Art Law," "The 1984 Supplement to the Deskbook of Art Law," "Art Law in a Nutshell," "The Book Publishers 'Legal Guide," "The Law [In Plain English]® For Craftspeople," "The Law [In Plain English]® For Writers," "Business and Legal Forms [In Plain English]® For Craftspeople," and several other books. I have edited "Law and the Visual Arts" and "Art Law: Domestic and International." I write a monthly column for "The Crafts Report" and a bimonthly column for "Sculpture Magazine," and my syndicated column on art law appears in numerous other art and craft publications.

Senator KENNEDY. Well, you are quite busy. [Laughter.]

Mr. DUBOFF. I would like to thank you, Mr. Chairman, and the committee for allowing me to come and testify in favor of this bill. I think this bill provides a beacon for the arts community and I would like to give it my unqualified support.

There have been a number of critics of the resale royalty provision, so I would like to focus my comments on that section. My written testimony will be offered and I won't read that. I would like to just make some oral comments.

I would also like to have put in the record a study that was conducted by the Bay Area Lawyers for the Arts, a volunteer lawyers organization in California, on the California Resale Royalties Act which, contrary to the statements made this morning, indicates that there is support. A majority of the dealers polled, a majority of the artists polled, all support the resale royalties provision in California. That study also indicates that, despite comments made this morning, there has been no perceivable effect on the art market in California.

Indeed, the suggestion that if this law is enacted the central art market will move from New York to some other offshore location, I think is a specious argument. New York has a fairly high sales tax. Oregon has no sales tax. The mere fact that New York has such a high sales tax has not caused the art market to relocate in Oregon, despite the fact that we would like to have it there. We have also not seen an exodus of art dealers to Oregon. In fact, the California experience is not a disaster. It has been a generally positive experience.

There has been some suggestion that the resale royalty provision might be ignored. The mere fact that that may occur is no reason to abandon the concept. Much of the practice of my law firm is in representing artists and other creative people in copyright infringement litigation. Copyright infringement is a situation where the copyright, the intellectual property rights of the creative person, are ignored and infringed against.

You don't throw out the copyright law merely because people violate it. Instead, what you provide is a vehicle by which people can redress wrongs, and that is exactly what the bill does. It has a provision which would enable the artist who is aggrieved to get redress for that problem.

I would, however, also like to answer a question that you, Mr. Chairman, raised earlier, and that is, why not let the market function freely and not have the Government become involved? The Constitution of the United States, article 1, section 8, clause 8, contains a provision which encourages this Congress to encourage the progress of science and the useful arts by providing for artists incentives such as those found in the Senate bill 1619. I think the Constitution actually contemplated situations such as this.

Also there are other comments on the resale royalty provision which would suggest that the original concept which began in France was also a disaster, and that France declined as a major art power. France declined as a major world power. We have seen France lose many of its colonies, we have seen France decline economically, and I would be very surprised if its loss of colonies, particularly the ones that I am familiar with, can be attributed to the "droit de suite." Indeed, there are other historical problems.

I think that the concept, the "droit de suite" concept, resale royalty provision in the bill, would actually provide the needed incentive for artists so that they can see that beacon. We represent artists in all walks of life—indigent and very successful artists. All of the artists that we represent have indicated that they feel the resale royalty provision would be a good thing. Even though many of them would not be entitled to participate in it at this time, they see it as a goal, something to reach for.

The first jurisdiction in the United States to actually have a resale royalty provision, contrary to what has been said, was not California but in fact was the municipality of Seattle. As part of its "Art in Public Places" legislation, it had a provision which enables the municipality to include a resale royalty provision in its artists' contracts.

Early on it put that provision in its contracts, and later in an attempt to lean those contracts down the provision was removed. Another reason the provision was removed is that the "Art in

Public Places" legislation in Seattle had no provision for deaccessioning. Recently they have adopted a deaccessioning program and, based on overwhelming support from the arts community, including artists, collectors and others, they are reintroducing the resale royalty provision into the "Art in Public Places" contract.

I would like to also commend you and your cosponsor, Mr. Chairman, for the other provisions in the bill. I think they will all go far in adding to the cultural heritage of our country.

Thank you.

[The prepared statement of Mr. DuBoff, with attachment, follows:]

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Testimony of Leonard D. DuBoff
Hearing on the Visual Artists Rights Act of 1987
Committee on the Judiciary
Subcommittee on Patent, Copyright and Trademark
December 3, 1987

I would like to thank the Chairman and Members of this Subcommittee for inviting me here today and giving me the opportunity to testify in support of S.1619.

The proposed Visual Artists Rights Act of 1987 has my unqualified support and full endorsement. I believe that each section of this proposed legislation will aid in establishing the appropriate statutory recognition of artists' interest in their work.

In addition, I urge that S.1619 be amended so as to acknowledge the contribution to society made not only by artists whose work is classified as "fine art", but also that valuable contribution made by artists whose work product is typically defined as "folk art" or "craft."

Foremost, however, I would like to address the issue of a statutory resale proceeds right and, in particular, address criticisms that have been made of that provision of the bill. It is my opinion, based upon my seventeen years of experience in the field of art law both as a professor and as attorney to many members of the art community, that a federal resale proceeds statute is both desirable and necessary.

It is clear that in the visual art market, artists are not adequately compensated for their valuable contributions to society and the reasons for this are quite well known:

(1) The "true value" of an artist's work is generally realized late in the artist's life and often only upon death.

(2) This delay in the value realization of an artist's work can be attributed to a delay in public understanding and appreciation of that work.

(3) An artist, in effect, subsidizes public art education with his or her poverty.

(Price, "Government Policy and Economic Security for Artists: The Case of the Droit de Suite", 77 Yale L.J. 1333, 1335 (1968)).

(4) Existing methods of artist protection, namely copyright and private contract, are inadequate and have been unsuccessful in providing appropriate protection for an artist's interest in his or her work product.

The essence of resale proceeds legislation is the acknowledgement of "the right of an artist to 'follow' or participate in the proceeds realized from the resale of the tangible embodiment of [the] work." (Brown, "Eligibility for Copyright Protection: A Search for Principled Standards", 70 Minn. L. Rev. 579 (1985) (citing Nimmer)).

There are many rationales for the implementation of resale royalty legislation. One is that the right to recognize a percentage of the proceeds from the resale of a work of art constitutes compensation for the exploitation of an artist's work, resale constituting a further exploitation. (Karlen, "Artists' Rights Today", 4 Cal. Law 22, 25 (March 1984)). Another rationale is that such a right acknowledges the latent value in a work of art. (Sherman, "Incorporation of Droit de Suite into United States Copyright Law, 18 ASCAP Copyright L. Symp. 50, 56-58 (1970)). A third rationale is that where one other than the artist recognizes substantial profit on the resale of the artist's work, it is only fair that the artist participate in the profit in order to avoid unjust enrichment. (Sherman, at 59.) Finally, it has been said that a resale proceeds right has as its purpose that which is stated under copyright law: "to stimulate and encourage production of artistic works by assuring that an adequate financial reward will accrue to the creator of the work." (Sherman, at 57.)

Critics of resale proceeds legislation argue that only a few artists benefit from such legislation. While it may be true that artists who do not achieve a minimal degree of fame are not likely to have their work resold, it must be remembered that the copyright statutes do not guarantee economic benefits to every aspiring author. Nevertheless, the copyright law provides the mainstay of economic security for that profession. Furthermore, there is no authority given to support assertions that only a very small number of "successful artists" in this country has a resale market and, thus, would receive protection under this legislation.

A right to resale proceeds clearly would give artists an incentive to continue to create works of high quality and stimulate public demand, thereby adding to the value of their works already sold. (Sherman, at 58-59). No longer would an artist be economically separated from his work product, which must certainly be seen as a benefit to more than a few artists.

The enactment of a federal resale proceeds right will serve as a benefit to visual artists, not a detriment. One could argue that art dealers may be discouraged from supporting contemporary art's primary market. There is, however, empirical evidence at least in California to the contrary. (Bay Area Lawyers for the Arts, "BALA Surveys Artists and Galleries on Resale Royalties" at 1, Alma Robinson, Nov-Dec, 1986) (hereinafter "BALA survey"). The argument that dealers will not resell contemporary art applies only to the dealer who finds art to be fungible and who, with no emotional ties to the work, holds the art only to profit by selling it. Collectors and other dealers, however, will buy what they like. Aesthetically aware buyers will not accept the premise that art is fungible.

Successful artists will, of course, always earn more money through the sale and resale of their work. The assumption that a resale proceeds right will mean the channeling of more money from the visual art market to successful artists is not, in my opinion, an adequate reason for denying all artists the opportunity to acquire resale proceeds. The artists whom I represent, both indigent and wealthy, have indicated that there is embodied in the resale proceeds right a goal for them. They are willing to sacrifice a great deal now in order to create quality works, stimulate demand, and add to the value of earlier works. Under a contractual system, dealers are given the opportunity to select those artists with whom they find it easiest to deal, typically those with the fewest demands. With federal legislation such as S. 1619, dealer selectivity is abrogated, giving all artists equal footing when attempting to consign or sell their work products.

The argument that dealers will be less willing to sponsor unknown artists because of a decrease in the profits realized on the sales of other artists' works is a specious one. It assumes a "Robin Hood-like" characterization of an art dealer, which is unjustified.

Furthermore, there is no authority to support the proposition that federal resale rights legislation will move the art market from New York to another location outside the United States. In fact, an empirical study of the California statute concludes that a majority of the art dealers polled approved of the resale royalty law. (BALA survey). While France did enact resale proceeds legislation and the French art market did decline, there is no evidence to suggest that the decline was the result of "droit de suite." France weakened as a world power, lost many of her colonies, suffered a decline in economic strength in many arenas, and I doubt that this can all be attributed to "droit de suite."

California's statutory resale proceeds right is considered successful as indicated by the BALA survey. There is no empirical evidence to support a contrary conclusion. In fact, a majority of both artists and dealers surveyed believed that the state legislation was a good idea. The fact that Sothebys allegedly stopped conducting contemporary art auctions in California upon the enactment of the resale royalty act and that some Californians may have sent their contemporary art work to New York for resale may be accurate but misses the point. Because the California statute appears to apply to the sale of works of art by residents of California in another state, the relocation of Sothebys' contemporary art auctions did not, therefore, exempt the California sellers from resale proceeds compliance. If, in fact, Sothebys did relocate its contemporary art auctions in an attempt to avoid the California legislation, then this fact underscores the need for a federal resale proceeds provision.

The "Art in Public Places" law enacted in Seattle permitted a resale proceeds right to be included in contracts by the Seattle Arts Commission. Seattle thus became the first municipality to pave the way for such artist protection. The provision authorizing resale royalties was deleted from the contract used by the Seattle Arts Commission in an attempt to streamline that contract and because there was no provision in the Seattle "Art in Public Places" law for the resale of works acquired under it. Once a provision for resale was included, overwhelming public demand and the urging of artists and other interested parties resulted in the reintroduction of the resale proceeds provision in the "Art in Public Places" contracts. There is, furthermore, no evidence to indicate that once a provision for resale was included the Seattle art market declined as a result of this protection.

As I mentioned before, I strongly support each of the sections proposed to amend the copyright law.

The abolition of the notice requirement on an artist's work is beneficial, as the United States is at this time one of the few remaining countries with such a requirement for copyright protection.

Similarly, I support the name attribution provisions found in Section 3, Subsection (b) of the Act. There have been situations where artists have actually been forced to resort to litigation in order to have their names removed from work because it was no longer representative of the artists' style or quality. (Behrens v. City and County of Denver, No. 79CV1644 (Colo. Dist. Ct. 1980)). For example, the Behrens case, although ultimately settled, involved a sculpture donated by a third party to the city of Denver, later vandalized and allowed to deteriorate. Artists such as Behrens, without this amendment, are currently forced to spend time and money in litigation in order to protect the integrity of their creations which have fallen into disrepair and yet continue to bear their creator's name. Another example of the benefit of this proposed amendment can be seen in Sanchez v. Stein, No. 80CV1208 (Colo. Dist. Ct. 1980), also settled. Sanchez had alleged that a sculpture Stein claimed as her own had actually been created by Sanchez, although commissioned by Stein. Clearly, this proposed section of the Visual Artsts Rights Act of 1987 is necessary in order to protect artists' rights to claim or disclaim ownership of their work products.

I also support the amendment proposed in Section 3, Subsection (c) concerning artists' moral rights. This will enable an artist to assert a claim of copyright infringement against one who substantially injures or destroys an artist's work of art, whether or not the artist owns the copyright in the work. This is consistent with the important interest an artist has in his work that continues after the work leaves his physical possesion. Because an artist is emotionally a part of the work he creates, a grievous injury to his reputation and career is inflicted where his work continues to exist in the public market place in an altered state. In Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S. 2d 813 (1949), the court held that a mural artist did not have any moral rights in his creations. Later cases have reaffirmed the fact that there is no counterpart to the European droit moral in American jurisprudence. Cf. Gilliam v. American Broadcasting Co., Inc., 538 F.2d 14 (2d Cir. 1976).

If the encouragement of artists in their work and the enrichment of our cultural heritage is an important societal goal, it is vital that American artists feel comfortable with the post-sale treatment of their work which is why the moral rights provision is necessary.

Finally, while I reiterate my support for the entire Visual Artists Rights Act of 1987 and applaud its sponsors for their efforts, I urge you to consider one further amendment to the copyright law: The inclusion of craftspeople within the definition of "artist." Unfortunately, S.1619 perpetuates the discrimination under the copyright statute against craftspeople who create works of art albeit in utilitarian forms, for example, weavers, potters, and many glass artists. The protection afforded under the copyright statute as it exists today and that promised by S. 1619 should be expanded to protect these people as well. Works created in utilitarian shapes are discriminated against even though their contribution to society is substantial, certainly a no less substantial contribution than that made by "fine artists." The distinction should, therefore, be abolished. In several states such as Massachusetts and Pennsylvania, and countries such as Japan, crafts artists are treated as fine artists. Discrimination that is the result of the medium in which one works or the shape of the art one creates is unfair. I therefore respectfully urge you to expand the scope of artist protection accordingly.

Thank you.

BAY·AREA·LAWYERS·FOR·THE·ARTS

BALA·GRAM

Vol. 4, No. 3 November/December 1986

BALA Surveys Artists and Galleries on Resale Royalties

By Alma Robinson, Esq.

In 1977, California became the first state to provide visual artists with a statutory right of royalties upon resale of their art works. This law, along with the state's Art Preservation Act and the Artist-Dealer Relations Act, was sponsored by State Sen. Alan Sieroty of Los Angeles, now retired, in an effort to improve the economic position of visual artists. The resale royalty may become a federal right if a proposed amendment to the U.S. Copyright Act is passed (See "Legislative Watch").

BALA undertook a study of the impact of the California law, Civil Code Section 986, by surveying visual artists, galleries and art auction houses with written questionnaires during the summer of 1986. Information was requested in order to find out whether artists have received royalties under the act, the level of voluntary cooperation on the part of dealers, the effect on the relationship between artists and dealers, whether art dealers feel that the act has had an impact on the California art market, and whether artists perceive a need for third party enforcement.

The Resale Royalties Act, Civil Code Section 986, requires that when a fine art work is resold by the owner for at least $1,000, the artist must be paid 5% of the gross sales price. The artist may assign the right to collect the royalty to a third party, but may not waive it. In the event that the buyer can't locate the artist, the royalty must be deposited with the California Arts Council (C.A.C.), which will then attempt to locate the artist.

continued page 2

Federal Visual Artists' Rights

A bill to amend the federal Copyright Act by dropping the requirement of visible copyright notice and giving visual artists new federal residual rights, has been proposed by Senator Edward Kennedy. The proposed legislation draws on concepts of "droit morale" and "droit de suite" which originated in Europe and are now in effect in California.

The bill proposes three categories of substantive changes. The first part resembles the California Art Preservation Act, granting artists moral rights in their work in addition to the basic economic rights guaranteed by current copyright statutes. Under present law, except in California, Massachusetts, and New York, an artist has no legal remedy if others distort, mutilate, or alter his art work.

The proposed bill will allow an artist to seek redress for such alterations to his or her work, as well as destruction of a work, even if the artist is not the copyright owner. However, as under California law, if a work of art, such as a mural, is part of a building and cannot be removed without damaging or altering it, the artist must expressly reserve his or her rights in writing before the work is installed in order to protect it.

This section also grants the artist the right to be acknowledged as the creator of his or her work whenever it is displayed publicly. Conversely, artists may also disclaim their works if they have been distorted, mutilated, or otherwise altered. An exception is if the work was prepared under contract for advertising or trade use.

The second part of the proposal would enable artists to receive a resale royalty of 7% of the difference between the seller's purchase price and the resale price, if that resale price is at least $500, and 140% greater than the seller's purchase price.

The last part of the proposal waives the requirement of public display of the copyright notice for pictorial, graphic or sculptural works of fine art. Artists will still be required to register their works with the Copyright Office under the proposed amendment.

To support this proposal, S. 1796, write a letter to your Congresspersons and to Senator Kennedy.

RESALE ROYALTIES continued

A total of 81 questionnaires were sent to San Francisco Bay Area galleries and auction houses (referred to as "art dealers"). 15, or 18.5 percent, were completed. Eleven art dealers out of the15 responding indicated that they have had some involvement in the resale of contemporary art.

Of the 208 questionnaires sent to visual artists, 36, or 17.3 percent were returned. The artists were asked to indicate the typical price range for their work, resulting in the following breakdown: 15 sell work below $500, 12 between $500 and $1,000, nine between $1,000 and $2,000, two between $2,000 and $5,000, six between $5,000 and $10,000, and two sell work for more than $10,000. As the figures indicate, there is some overlap in price ranges. Of the 21 who answered a question about what percentage of their income is derived from art sales, four said they derive 95 to 100% of their income from art, one indicated between 50 to100%, six answered 25 to 60% and10 indicated 10% or less.

In general, both artists and dealers approve the law. Both groups were asked if they thought the Resale Royalties Act is "basically a good idea." While 30 out of 36, or 83.3 percent, of individual artists thought so,11 out of 15 art dealers, or 71.2 percent, replied affirmatively.

There was, however, general agreement that applicable resales are rare. In fact, only three of the artists responding to the survey had received royalties under the act, while four art galleries reported handling a total of at least 22 resale royalties since 1977.

Only one art dealer thought that the law should be repealed, while two other dealers thought that the act could be improved by making it applicable nationally. Asked if the act had affected their willingness to deal in certain types of work, 14 dealers said no. None of the dealers said the act had had a significant effect on their sales, while only two felt that the act has had a significant effect on the California art market. One art dealer reportedly changed its business practices to inform their artists about the Act.

A 1983 amendment to the law, worked out as a compromise between advocates for artists' rights and associations of art dealers, provides that when a dealer buys art outright from an artist, as opposed to buying it on consignment, the dealer's resale is exempt from the royalty requirement if it takes place within 10 years of the initial sale by the artist. Asked if this exemption is helpful, 13 dealers replied yes. One commented that without the exemption, she would stop buying art outright and limit her activity to consignment sales. Another said, "Dealers often buy in order to help the artist survive from one show to the next (actually an advance on future sales)."

When asked whether artists should have access to dealers' sales records, eight said no, and five said yes. However, 12 gallery owners said that they do provide artists with names and addresses of buyers of their works. One respondent commented, "We believe that it is a very important service. This helps artists keep track of the work for future museum shows, etc." However, another gallery director said she makes decisions on an individual basis, stating that "a lot of patrons don't want their names given out for security reasons, etc. Most people don't want their names spread around..." On the other hand, a different art dealer suggested that there should be "a central system like auto registration to keep up with the sales."

Artists mentioned problems with enforcing the right to royalties, combined with the difficulty of obtaining information about sales and buyers, as their main concerns. Of the 36 artists who responded, five said they were reluctant to enforce their rights under the act, fearing that it would be harmful to their careers. One artist who has received a resale royalty expressed a fear that the law "may hinder larger resales, which tend to be done out-of-state."

Four artists said they had dealt with galleries or individual owners who were reluctant to comply with the Act voluntarily, while 11 reported that galleries had refused to give them information about the sale of their work, "including buyers' names, addresses and resale prices." Six said that they felt they may be entitled to royalties under the Act which have not been paid, while two said that art dealers had told them that they would refuse to deal with their work if they asserted their rights to resale royalties.

When questioned about possible enforcement by an outside agency, 22 artists said that they would allow a private agency to enforce their rights. Only 13 artists would, however, use such an agency if it took a "substantial percentage" of the royalties as a fee. Twelve artists said that a state agency should enforce the law. Another artist who has received two royalties felt that her standard contract, which calls for a 15% resale royalty, was more effective than the statutory right.

The State Arts Council has a relatively passive role in implementing the Resale Royalties Act, receiving funds which are deposited by sellers who cannot locate the artists. If an artist fails to file a written claim for the proceeds within seven years after the resale, the funds can be used for the Council's Art in Public Buildings Program.

At last inquiry, $13,435 had been deposited in a C.A.C. trust account on behalf of 14 artists. Most of the artists were recently paid. However, funds are still being held for Jean-Paul Riopelle, Phillipe Hosaisson, Michele Cascella, and Bennett Bradbury. Anyone who knows these artists should advise them to contact the Council, (916) 445-1530.

BALA gratefully acknowledges the assistance of the following individuals on this research project: Rick Wallace drafted the questionnaire with input from Board Members John J. Davis Jr., Esq. and Professor Thomas Goetzl and Advisors Peter Fairbanks of Montgomery Gallery and Richard Mayer of Artists Equity. The survey was executed and analyzed by John Hall, Ron Michioka, Lisa Conrad and Stephanie Sheridan.

Senator **Kennedy**. Well, thank you. Thank you very much, Mr. DuBoff, for your testimony.

I think with regard to the provisions dealing with the creation of the moral rights that everyone on our panel is strongly in support of those provisions. We will note for the record an affirmative nodding of the heads by Messrs. Merryman, Hopkins, and DuBoff.

Mr. **Merryman**. Yea.

Senator **Kennedy**. Three yeas.

Let me, Mr. Merryman, just challenge some of the points you raised, in an attempt to make as complete a record as possible. You have been quoted as saying,

> My position on this point in opposition to the resale royalty is not idiosyncratic. Every knowledgeable and thoughtful person who has studied the economics of the resale proceeds right has come to that same conclusion.

Of course, we have a rather distinguished group of both organizations and artists that don't agree with you, ranging from the leadership of the National Artists Equity, New York Artists Equity, the Society of Illustrators, Magazine Photographers, Graphic Artists Guild, National Association of Local Arts Associations, American Council on the Arts, the Boston Visual Artists Union, among others—a large number of groups who have endorsed the bill. Are we to assume that they are less thoughtful or knowledgeable about art than yourself, or that there is no room for accommodation of various perspectives on the issue?

Mr. **Merryman**. Senator, some of my best friends are artists. [Laughter.]

Senator **Kennedy**. We have heard that kind of statement in this Judiciary Committee room before relevant to other issues. [Laughter.]

Mr. **Merryman**. I think my point would be that the only disinterested studies of the resales proceeds right by economically qualified persons have arrived at the conclusions I spoke of. The organizations that——

Senator **Kennedy**. You will let us know—and provide citations?

Mr. **Merryman**. Yes, I will be happy to include not only the citations but the texts of those studies in the record.

[Material referred to above follows:]

STANFORD LAW SCHOOL

December 9, 1987

Senator Edward Kennedy
Senate Office Building
1st and Constitution Avenue, N.E.
Washington, D.C. 20510

Dear Senator Kennedy:

At the hearings on S.1619 at which you presided on December 3, you requested that I furnish copies of disinterested studies of the resale proceeds right for the record. By "disinterested" I meant: prepared by people who had no vested interest -- unlike artists and dealers -- for example, and who were not ideologically committed -- as are Volunteer Lawyers for the Arts and Professor Duboff, as examples -- to the right. Disinterested people seek, without commitment to any particular outcome, to understand how the resale proceeds right would work. As I stated in my testimony, all of the disinterested studies I have been able to find concur that the resale proceeds right might benefit the handful (no more than 300 or so) of successful artists, but only at the expense of the hundreds of thousands of artists who have no secondary market for their work.

The studies to which I referred are: (1) Weil, Resale Royalties: Nobody Benefits, in Stephen E. Weil, Beauty and the Beasts 210 (Smithsonian Institution Press 1983) (a copy is already included in the Committee's record, appended to my written testimony); (2) Price, Government Policy and Economic Security for Artists: The Case of the Droit de Suite, 77 Yale L.J. 1333 (1968) (copy enclosed); (3) Rottenberg, The Remuneration of Artists, Frontiers of Economics (1975), p. 45 (a copy will be sent soon); (4) Michael Asimow, Economic Aspects of the Droit de Suite, in Legal Rights of the Artist, ed. M. Nimmer (Washington, D.C., National Endowment on the Arts and Humanities, 1971) (relevant portion enclosed); (5) Bolch, Damon & Hinshaw, An Economic Analysis of the California Art Royalty Statute, 10 Conn. L. Rev. 689 (1978) (copy enclosed); and (6) Camp, Art Resale Rights and the Art Resale Market: An Empirical Study, 28 Bull. Copy Soc. 146 (1980) (copy enclosed).

The topic of the German resale proceeds right came up in our exchange. If I could see a copy of the communication to which you referred, perhaps I could clarify the matter.

It was a pleasure to meet you and to testify in partial support of your bill. You should know that I did not lightly agree to travel to Washington to testify against the proceeds right and only did so because, as a disinterested scholar, I believe that it is bad policy and would make bad law.

Sincerely,

Government Policy and Economic Security for Artists: The Case of the *Droit de Suite*

Monroe E. Price[*]

In the law of art, as in art itself, we innocents often look abroad for tasteful instruction. That process is now taking place with respect to the *droit de suite*, an interesting addition to the copyright laws of France,[1] Italy,[2] and Germany,[3] among other nations. Roughly translated as an "art proceeds right," the *droit de suite* is a technique originally designed to furnish artists and sculptors with some portion of the increase in the value of their works when they are resold.[4] Sometimes, as in France, a flat fee is payable to the artist or his heirs on the public resale of all paintings, and the fee must be paid whether the painting rises in price or not. In Italy, on the other hand, the artist is entitled to a *droit de suite* only on the increase in value of the work of art. The techniques used differ with respect to the resales covered (auctions, dealer, or private sales), the percentage of the resale price the artist obtains (three per cent in France, one per cent in Germany), the minimum price the object must bring before the mechanism is brought into play at all, and the length of time during which the mechanism operates (in the American proposal life of the artist plus 50 years).[5]

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[*] Acting Associate Professor of Law, UCLA School of Law. A.B. 1960, LL.B. 1964, Yale University.

This paper has benefited greatly from discussion with two wise experts, Professor Melville Nimmer, and a perceptive art historian, my wife, Aimèe Brown Price. Research for this paper was assisted by the National Endowment on the Arts.

[1] For the French legislation, see Law of May 20, 1920, amended, Law of March 11, 1957, art. 42, [1957] J.O. 2723, [1957] B.L.D. 197. While the new law extends the *droit de suite* to private sales, that aspect of the law has not been implemented. The royalty rate is applied only when the sale price is at least 100 francs.

[2] The Italian version was passed April 22, 1942; Copyright Law No. 633, Art. 144-55. It is a complicated piece of machinery which now shows definite signs of rust and decay. Basically, there is a sliding scale of percentages for the author: the greater the plus value or inflation in price, the greater the artist's cut (up to 10 per cent on increases in excess of 175,000 lire). The tax applies only to paintings which sell for more than 5,000 lire and sculpture which sells for more than 10,000 lire. The law applies also to private sales, but only where the price of the work has quintupled.

[3] In Germany, the *droit de suite* was enacted in 1965. Art. 26 URG. The German copyright act represents a compromise between the French and the Italian systems. Artists are only entitled to one per cent of the proceeds of any resale of work where the resale has occurred through a public facility (auction house or dealer). If the sale price is less than five hundred German marks, then no *droit de suite* will be collected. Art. 26, Copyright Act of 1965. While there is general agreement that a collection agency such as ASCAP is necessary to enforce the new right, no such agency has been formed and none is in the offing.

[4] There are two English language discussions of the right: Schulder, *Art Proceeds Act: A Study of the* Droit de Suite *and a Proposed Enactment for the United States*, 61 Nw. U.L. Rev. 19 (1966); Hauser, *The French* Droit de Suite: *The Problem of Protection for the Underprivileged Artist under the Copyright Law*, 11 American Society of Composers, Authors and Publishers, Copyright Law Symposium 1 (1962). The leading foreign source is M. Duchemin, Le Droit de Suite des Artistes (1948); *see also* H. Desbois, Le Droit d'Auteur (1950).

The *droit de suite* springs from certain assumptions about the relationship between society and its artists, particularly painters and sculptors, and from a belief that the artist does not receive a fair price for his work. The current demand for an art proceeds right is buttressed by allegations that copyright schemes, including currently proposed revisions, do not provide just compensation for most painters and sculptors as compared with authors.[6] If the assumptions on which the *droit de suite* is based apply to America, the art proceeds right may offer a method for remedying the plight of these artists by enabling them to realize a part of the appreciation in value of their work. This essay examines the assumptions underlying the *droit de suite*, tests their validity in the American context, and explores alternatives to an art proceeds right to determine if they better comport with the American temperament, the American art market, and the needs of the American artists.[7]

I. The Theology of the *Droit de Suite*

To appreciate the concept of the *droit de suite* and the fervor of those promoting it, the model of society and the artist within it upon which the art proceeds right is based must be understood. A survey of the literature on the *droit de suite* reveals a deep-seated romantic view of art and the artist that colors most discussion of the beneficial aspects of the statute.[8] A French writer, R. Plaisant, has put it succinctly: "It is a matter of fact that often artists sell their works for little money and that some years afterward, sometimes after their death, these works are resold for a very high price. To give a participation to the artists or their heirs on this high price is equitable."[9] The *droit de suite* springs from a nostalgic recollection of the late nineteenth century. It is a case, not unusual, of legislation passed or posed to correct a situation that no longer exists with the intensity that provoked reform.

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[5] Proposed Copyright Revision Bill, S. 1006, 89th Cong., 1st Sess., § 302(a).

[6] *See* p. 1342 *infra*.

[7] There have been vigorous efforts to internationalize the right. For competitive reasons, the French are particularly anxious to see the right awarded at other major art centers. For example, in 1963 at a conference held under the auspices of the Minister of Cultural Affairs, it was acknowledged that "while [the Commissaires-Priseurs] continue to believe strongly in the maintenance of the *droit de suite*, it has become a heavy burden in the international market and therefore must be reformed." The Commissaires-Priseurs' recommended that the tax on sales in excess of 20,000 francs be reduced from 3 per cent to 1 per cent and that no *droit de suite* be collected where the only recipient would be "collateral" heirs (as opposed to a wife or direct descendants). Such charges, it was felt, would yield "a simple formula, fair and reasonable; only with such a reform would there be a substantial chance to internationalize "this excellent institution created by the French. *See* Report, *infra* note 47; Hauser, *supra* note 4, at 21. The Berne Union Convention for the Protection of Literary and Artistic Works (1886, revised 1948) provides for reciprocity in treatment (Article 14-bis): "The protection provided . . . may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the degree permitted by the country where this protection is claimed." Reprinted in UNESCO, Copyright Laws and Treaties of the World (1956).

[8] Duchemin, for example, cites such stories as the hungry wanderings of Millet's grand-

The *droit de suite* evolved from a particular conception of art, the artist, and the way art is sold. At its core is a vision of the starving artist, with his genius unappreciated, using his last pennies to purchase canvas and pigments which he turns into a misunderstood masterpiece. The painting is sold for a pittance, probably to buy medicine for a tubercular wife. The purchaser is a canny investor who travels about artists' hovels trying to pick up bargains which he will later turn into large amounts of cash.[10] Thirty years later the artist is still without funds and his children are in rags; meanwhile his paintings, now the subject of a Museum of Modern Art retrospective and a Harry Abrams parlor-table book, fetch small fortunes at Park-Bernet and Christie's. The rhetoric of the *droit de suite* is built on this peculiar understanding of the artist and the art market. It is the product of a lovely wistfulness for the nineteenth century with the pure artist starving in his garret, unappreciated by a philistine audience and doomed to poverty because of the stupidity of the world at large. The *droit de suite* is *La bohême* and *Lust for Life* reduced to statutory form. It is an expression of the belief that (1) the sale of the artist's work at anything like its "true" value only comes late in his life or after his death; (2) the postponement in value is attributable to the lag in popular understanding and appreciation; (3) therefore the artist is subsidizing the public's education with his poverty; (4) this is an unfair state of affairs; (5) the artist should profit when he is finally discovered by the newly sophisticated market.

The accuracy of this conception aside, it is interesting that it is so strongly held and that it so strongly influences attitudes toward legislation. Despite the rewards our society provides those who rebel and innovate, the romantic image of the poor painter continues to dominate public thought. One reason for this fixation on the poor artist and his needs is suggested by Geraldine Pelles: "the artist's intense commit-

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daughter while a painting by her grandfather was sold for 1,000 times the amount he originally received. *See* M. Duchemin, *supra* note 4, at 18, 155.

[9] R. Plaisant, Analysis and Criticism of French Proceeds Law (unpublished manuscript in UCLA Law Library), at 3-4.

[10] *See generally* W. Schack, Art and Argyrol (1960).

ment to a precarious occupation seems a counterbalance to the leveling of aspirations in the society of the Organization Man; he is regarded as one of the few who uphold values that others profess but negate in their work. Despite economic embarrassment, the artist seems to wield unpurchasable power as he manipulates an environment in the world of his painting."[11] Moreover, the romantic idea is as important to artists as it is to the audience for art. Poverty or its semblance is a uniform which distinguishes the artist from his bourgeois audience. Lack of money is a celebration of sorts. Part of the burden of being a prophet in a philistine society is the burden of being misunderstood and neglected.[12]

It would not be a matter of great concern if this model of behavior and antagonism, of revolt and poverty, existed solely to reinforce opinions that the public had about itself and its worries about taste and judgment. Unfortunately, this perception of the artist can have perverse effects if it is the basis for public policy. The government then concentrates on a perceived but possibly unreal inequity—namely, the lag in market acceptance of artists' works which is thought to occur because artists are always ahead of their times. If this lag is unavoidable, society must do some penance for its thickheadedness; the artist should not support the entire maturing process. The *droit de suite* is exactly this kind of penance. It is a tax on the second generation for the stupidity of its forefathers. Or, more charitably, the *droit de suite* assumes that the current generation is as blind to the virtues of contemporary artists as the preceding generation was to its avant-garde. If each group post-pays, then some justice will ensue. Painters still may not get rich while they are painting—that is consonant with the romantic view of creation—but their retirement years will be more secure and their wives and children will have some profit.[13]

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[11] G. PELLES, ART, ARTISTS AND SOCIETY, 157 (1963):

> Because of his archetypal sacred aspect, the hope of salvation is attached to him in a world that badly needs saving. His admirers place an unfair burden upon the artist by expecting him to accomplish through art the inner and outer metamorphoses that belong to other spheres of life. At the same time, the wider dissemination of the idea that every man is potentially an artist implies that every man can participate in these metamorphoses. The probable failure of such expectations may sow the seeds of disillusionment from which the artist himself and the idea of art must inevitably suffer.

See also id. 36-37.

[12] See 3 A. HAUSER, THE SOCIAL HISTORY OF ART, 195 (1951).

[13] The special virtue of the *droit de suite* is that with one thrust it preserves the struggling artist, starving in his garret, while it salves society's conscience by paying a token to him or his estate when it finally recognizes the quality of his work. A weakness of the *droit de suite* is the narrow time span over which it operates as compared with the time it takes artistic taste to mature. If it is penance society is doing, and it is paying the

II. The Droit de Suite in the Marketplace

The *droit de suite*, as developed in Europe, is based on a set of specific assumptions about the relationship between price and "value" and the kinds of commercial transactions which characterize the market for paintings and sculpture. Therefore, certain aspects of the production and distribution of these art forms in America must be examined to determine the relevance of the *droit de suite* model on our less romantic shores.[14]

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penance within fifty years of the artist's death, then fashion must mature or begin to mature within that time. But it has not always been the case, even in this accelerated century, that the inflation in art values attaches to work painted in the twilight years of an artist's life or within fifty years after his death. If impressionism or post-impressionism is the rage in the 1920's and after, then the model works, if creakingly. But when the fashion in 1960 becomes pre-Columbian art, or the Ashcan school, or vorticism, the *droit de suite* has little of the desired effect. In other words, if living artists are recognized during their productive period, the *droit de suite* is unnecessary; if they become fashionable more than fifty years after their death, it is irrelevant. Thus the *droit de suite* model is confined to a special type of art market, one which is increasingly uncharacteristic of art purchasing habits by collectors and museums.

[14] For a similar attempt in a more limited context, see C. Goodman, The Economics of a Lithography Workshop (1964).

The problem of authentication presents special difficulties. In fact, if the painter is asked whether the painting is authentic, the *droit de suite* may provide an inducement for the artist to "authenticate" faked works. Of course, if acknowledging the painting as his would depreciate the artist's reputation, the painter would not authenticate. But most fakes presented to the artist for authentication would probably be quite good. If the work is an unauthorized cast from the artist's mold, or even an expert cast from an unauthorized mold, or if it is a good painting in the artist's style and worthy of his name, why should he not collect the *droit de suite* proceeds? In concentrating on the relationship between the law and the art market, certain sophisticated issues concerning the *droit de suite* which normally draw discussion will be omitted. For example, it would be possible to engage in the debate involving the nature of the artist's ownership of a work of art. An extensive exploration of the nature of this right may be found in E. Drone, The Law of Property in Intellectual Productions 1-53 (1879). European commentators have frequently attempted to determine whether the *droit de suite* is part of an artist's "copyright" or whether it is in the nature of "alimony," whether it is a contract right or a property right. Some commentators think that if one can decide for certain what category of right the *droit de suite* represents, certain knotty problems will be solved, such as rights of inheritance, the application of international treaties, and the privilege of the artist to assign the right. *See* P. Grece, I diritti sui bene immateriali, (1948); H. Desbois, Le Droit d'Auteur, §§ 290-93 (1950); Schulder, *supra* note 4, at 28. Some interesting examples of cases where artists' rights are involved may be found in MacNeil, *Some Pictures Come to Court*, Harvard Legal Essays 247 (1947). Whistler's exhortation after the case of Whistler v. Eden, Dalboz, Jurisprudence Générale, 1900, pt. I, 497, discussed in MacNeil, *supra*, and from which the material discussed here is obtained, represents one view of the artist's right:

RESUMÉ

> Prestige Of The Work Of Art And Privilege Of The Artist—*Established: The* ABSOLUTE RIGHT *of the Artist to control the destiny of his handiwork—and, at all times, and in all circumstances, to refuse its delivery into unseemly and ridiculous keeping—*
>
> *The* DIVINE RIGHT *of the Artist to pay damages, and so rid himself cleanly of the carelessly incurred, and pertinanciously unbecoming company of this hereintofore completely discovered, penetrating—perservering—planning—devising—Valentine designing—pestilential, and entirely matagrabolising personage!—*
>
> *Who forwith empouches the gainings—unthinkingly, unblushingly, inevitably!—and once more unwittingly and predigiously justifies the judgment!*

MacNeil, *supra*, at 260.

A. *Style and Trend: Their Impact on A Droit de Suite*

The usefulness of a *droit de suite* depends, to a large extent, on the kind of art that is produced and the kind of product the government wants to encourage.[15] Indeed, it is impossible to measure the relevance of so important a concept as the *droit de suite*, or any other techniques, for providing greater economic security for artists without a great deal of information about trends and movements in art. The extent to which an artist (and, when generalized, a whole school or generation of artists) will benefit from the *droit de suite* depends largely on the kind of work

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There is also some merit in determining, in abstract fashion, what kind of "property rights" really exist in a work of art, in explicating how the relationship of creator to creation is different from the relationship of manufacturer to his product. Various theories for the *droit de suite* concept have been formulated. The French view is that it is a contract right compulsorily inserted; it is also possible to say that the right recognizes that "the intrinsic value" of the work of art is not wholly fulfilled by the purchase price, and that latent rights must be protected. *See* Opet, *Der Wertzuwachsanspruch des bildenden Kunstlers*, 46 Annalen des Deutschen Reiches, 368, cited in Hauser, *supra* note 4. In some contexts, there are practical virtues in examining what impact there is on the bundle of rights where a transfer of a work of art from artist to purchaser occurs.

For example, the implications of international treaties might be affected by characterization of the right. Under the Universal Copyright Convention, the signatories pledge themselves to equality of treatment under the copyright laws. Copyright rights available to nationals are available to foreigners. But is the *droit de suite* a copyright right? *See* A. Bogsch, The Law of Copyright Under the Universal Copyright Convention 411-12 (1964). Article 14(bis) of the Berne Union Convention addresses itself to the reciprocal availability of art proceeds rights. For another example, descent and devolution might be determined by the characterization of the right which *droit de suite* represents. This has been a problem under the French law, particularly as to the class of heirs who should be protected.

The way the right is perceived will probably be a reflection of the way other rights in the bundle are treated. It is often said that the artist has certain moral rights which give him a continuing interest in the use and abuse of his works. Article 6(bis) of the Berne Convention encourages its signatories to provide such rights. *See* Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 Harv. L. Rev. 554 (1940). *See also* M. Nimmer, Copyright § 110.3, (1967). In France, the artist may protect the work from desecration; he may reclaim a mural to save the work when the building in which it stands is destroyed. *See* Roeder, *supra*. An American discussion of the moral right which is contrary to the French position may be found in Crimi v. Rutgers Presbyterian Church, 194 Misc. 570, 89 N.Y.S.2d 813 (Sup. Ct. 1949).

The nexus between a painter and his *oeuvre* is never wholly severed. In a legal context where such moral rights are readily recognized, even celebrated, continuing economic rights do not seem an unusual extension. It is impossible, however, to look at property rights without considering the market place context. We may wish to provide a special status and an exalted economic position for American artists; but it would be a foolish and misleading shortcut to say that there is something inherent in the concept of art—wherever it is created and sold—which furnishes the artist with particular privileges. The relationship between the artist and his work is largely a product of the cultural ambience; and whether a work of art is at all valued is, in itself, a matter that varies from time to time and from society to society. A few of the many studies which discuss this problem are: T. Munro, Toward Science in Aesthetics 67-148 (1956); Aesthetics Today (M. Philipson ed. 1961); Lehmann-Haupt, Art Under a Dictatorship (1954).

[15] It is impossible for the government to be wholly value-free in supporting or not supporting various schools of art. The proposed American act for an art proceeds right has a ring of neutrality to it; seemingly the market decides where the rewards will be. The state is a mere policeman. But this neutral pose betrays a false modesty. To the extent that the *droit de suite* is effective, it is an incentive to produce work that can and will be resold. It is designed for easel paintings and traditional sorts of sculpture.

he creates: whether it is monumental sculpture or easel painting, plastic or iron, auto-da-fé or laminated for preservation. It depends as well on the demand profile: the percentage of purchasers who are corporations, museums, young adults with limited incomes, or wealthy patrons (who, though limited in number, may support an entire movement). The usefulness of the *droit de suite* is also a function of how the artist produces his work, how many versions there are, how divorced the conception is from the execution.[16] The value of a *droit de suite* is changed by shifts in government policy which affect the art market: general income tax increases, the existence of a war, more extensive public higher education. Changes of styles in architecture and landscaping, which create or destroy opportunities for the exhibition of works of art also significantly influence the market. The factors that affect the art market and thus the operation of a *droit de suite* are so many and so complex that a complete treatment is beyond the scope of this study. It will be useful, however, to look at several important trends in art marketing and to note their effects on an art proceeds mechanism.

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[16] The art proceeds right is particularly designed for works of art where the conception is embodied in one object and in that object only. Normally it must be an "original work of art" meaning, usually, "a work that is unique such as a painting, sculpture, drawing or illustrated manuscript." Schulder, *supra* note 4, at 44. The Registrar of Copyrights has recommended legislation that would provide a "Registry for Unique Art Objects," primarily to defend against art frauds and to facilitate authentication. The definition of the qualifying items in the proposed bill (not yet introduced in Congress) defines a work as a "unique art object" if:

(1) the material object is that in which the work of art was first embodied in finished form; and
(2) the work of art embodied in the object has not been lawfully reproduced in any other material object possessing substantially the same physical characteristics.

It is not unlikely that there will be an increasing divorce between the idea for a work of art and the actual execution which can or must be delegated to a machine or to workmen. Indeed, at a recent exhibition at the Chicago Museum of Contemporary Art, the divorce was flaunted. People were invited to order art objects by telephone, to be made according to request. Because this divorce means a greater likelihood of mass production or many versions, it will diminish the meaningfulness of the requirement of a "unique, one-of-a-kind" work of art. A similar problem already exists under the administration of the *droit de suite* in France. *See* R. Plaisant, French Law on Proceeds Right, §§ 26-32, 1967, (unpublished manuscript). For example, he notes that a copy of a painting can itself be a work of art (one thinks of Larry Rivers' rendition of Rembrandt); for sculpture, the *droit de suite* is assessed not only on the original work, but on bronze reproductions when they are signed and numbered (there seems to be a limitation based on some informal sense of the proper size of an edition). There is some indication that a *droit de suite* would not be paid on the sale of the mold. Similarly, an art proceeds right is forthcoming when engravings are produced in a limited signed edition. "It seems that the royalty is not to be paid on the sale of the plate itself, which is to be compared with a manuscript." R. Plaisant, *supra* note 9, at 30.

In terms of the problem posed in the text, the engraver's plates, like the sculptor's mold, the matrix for records, the architect's blueprint, and the author's manuscript are concrete aspects of the conception but not "work of art" in the technical *droit de suite* sense. If the author could claim an art proceeds right on his manuscript it would be a cunning turnabout on the first alleged discrimination. *See* p. 1334 *supra*. Yet, Article 14(bis) of the Berne Convention encourages such protection for manuscripts.

1. *Drawings, Studies and Versions*

One recent trend in the American art market which affects the relevance of a *droit de suite* for traditional easel painters and sculptors is the increasing popularity of *drawings, studies, and versions.* This growth in the sale of preliminary drawings has two implications for a *droit de suite.* First, it enables the struggling artist to have a more uniform income over the year by capitalizing on the market for works of art from $10 to $300. Second, it provides a technique for cashing in on the increase in value of the principal work or of early major works. Under the *droit de suite* model, government assistance for the artist is necessary because he is not able to enjoy the future increase in a painting's or sculpture's value. The sale of preliminary sketches and studies may fill this gap. For example, a sculptor like Reuben Nakian can withhold many drawings, preparatory clay models, and fragments of bas reliefs while his sculptures have jumped in value from $500 to $3,000. The drawings and models are now worth in excess of $300 each. Because they were kept, they provide some method for Nakian to enjoy the increase in value in his early already sold sculpture. Finally, there is evidence that some painters render versions of successful paintings to gain a present financial reward for works that were once sold cheaply. De Chirico, for example, imitated his own early and more valuable style.

2. *Multiples*

The *droit de suite* is particularly designed to protect artists who produce unique works of art like painting and sculpture. It is possible, however, that the concept of an "original" work itself is misleading and that artists are currently moving away from such concrete and unique embodiments of their creative conception. If fewer and fewer artists rely on something that resembles a masterpiece in oil for their livelihood, then the *droit de suite* loses significance as a tool for economic reward.[17] The extent of the problem was suggested by Charles Spencer in reviewing a set of "originals" that are capable of infinite reproduction:

> Richard Smith's *Sphinx* series of five three-demensional screen prints indicates the possible scope. They are simply printed aluminum sculptures, or forms, in editions of 50 . . . . Tilson, for Malborough, has also produced "multiples" in metal and pressed

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[17] Recent magazine articles are full of examples of such new products. An example is an article in the N.Y. Times, Oct. 11, 1967, at 49, col. 1, reported the marriage of art and technology in New York with R. Rauschenberg acting as clergyman. *See* Kaprow, *Death in the Museum*, ARTS MAGAZINE, Feb., 1967.

> plastics . . . . The fact that casting ensures only a limited number of worthy copies is no philosophical argument against producing hundreds of perfect ones by new technical processes. Objections by artists and dealers that mass product will reduce their incomes have long been disproved.[18]

Although the possibility of infinite reproductions which have the integrity of "originals" was virtually unknown in the past,[19] there are signs that such processes have now assumed some aesthetic importance in their own right. More important from the point of view of the *droit de suite* is the increasing acceptance by the art world of the industrial practice of separating invention from execution. With the proliferation of industrial techniques adaptable to current aesthetic tendencies, the concept of an "original" will probably weaken considerably. The "orginal" in art, as in architecture, will be a blueprint, a set of sketches and instructions to the craftsman. Of course, the fact that an increasing number of artists may be producing multiple reproductions does not mean that the painter of a original oil should be stripped of art proceeds protection because his oil is not produced in numerous copies like a book. But the necessity for a *droit de suite* is less pressing if one considers painters and sculptors as a group rather than focusing on particular classes of artists.

3. *Scale*

Much of the recent work in both painting and sculpture has been of monumental scale. If the artists whom the government wants to foster are creating works several stories high or room size, then the *droit de suite*, with its assumption of periodic resale, may be inappropriate or irrelevant. Hilton Kramer recently commented on the "Scale as Content" show at the Corcoran Museum in Washington, D.C., calling the movement to create sculptures of immense size "one of the salient features of the current American art scene." One of the works in the exhibit, Richard Smith's "Smoke," was "an open-form structure of black-painted plywood that stands 22 feet high and reaches almost 50 feet in length, filling the two-story classical South Atrium of the Corcoran."[20] Indeed, there are indications that two of the strongest movements in art at the present time are towards work easily reproducible on the one hand, and works of monumental scale on the other, categories for which a *droit de suite* is either unnecessary or unworkable.

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[18] ART AND ARTISTS, March, 1967, at 52-54.

[19] Of course, limited versions and copies, often made by a school, are an age-old practice.

[20] *See* N.Y. Times, Oct. 7, 1967, at 24, col. 2.

4. *Distribution*

The distribution system for works of art is as important in determining the relevance of the *droit de suite* model to the American art market as are issues of style. However the *droit de suite* is applied and enforced, there must be transactions which are more or less public. In France, the *droit de suite* is only applicable to resale at auction.[21] Such a rule in America would make an art proceeds benefit virtually useless since in this country auctions are a comparatively unimportant locus of sale and resale. The workability of the *droit de suite* would also be affected by what appears to be the declining role of galleries, at least in the traditional sense, in the representation of artists and the sale of works of art. Works of art are now apparently held by single owners for longer spans of time. And the increase in the number of museum and corporate purchasers, and in purchases by the government, means that a larger number of paintings will be held indefinitely by single purchasers making a *droit de suite* inapplicable. With the increasing participation of such institutional purchasers in the art market, the importance of the corner art gallery that exhibits and does some off-the-street business seems to be declining. In its place there is emerging a type of agent who avoids the overhead costs of a gallery and concentrates his selling talents on a selected list of purchasers, mainly corporations, governmental and private commissions, museums and large collectors. The tendency of artists to produce works of monumental scale reinforces these patterns of distribution; such an artist wilfully rejects a potential market by producing work that is too large or too expensive for the normal clientele of a gallery.[22]

B. *The Law and the Market: Authors, Artists and the Copyright Law*

The Constitution and copyright laws evidence a public concern that individuals who produce works of art should be encouraged and protected in their efforts.[23] Unfortunately, many believe that the copyright statute was designed and written with authors, not painters or sculptors, in mind. The copyright statute permits the author to reap continuing benefits from the sale of his books so that his prosperity rides with the times: when his book is popular, he is enriched; when sales lag, he can wait. A painter or sculptor, it is commonly thought, has no such luxury. The sale of his painting or sculpture is a single, final event for him; the copyright mechanism offers him no technique for obtaining the comforts of a continuing financial stake in future sales of his art work.

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[21] *See* French legislation cited *supra* note 1.

[22] Ephemeral works present an analogous problem. If art objects are self-destructive, or made so that they deteriorate rapidly, the market for resale is diminished and the chance of an ephemeral work, in this sense, being resold and producing a *droit de suite* is nil.

[23] U.S. CONST., art. I, § 8; 17 U.S.C. § 1, *et seq.* (1964).

If the benefits extended to artists under the copyright statute were in fact distributed discriminatorily, remedial legislation would be called for to correct the legislative oversight. As one Italian writer has said of his nation's major motive for the adoption of the art proceeds act: "The principle that the artist should follow the fortunes of his works has already been applied to the intellectual works which can be reproduced in copies or are subject to multiple utilizations (performing rights, copyrights, etc.)."[24] An American author summarized the discrimination as follows:

> Copyright protection is given to a creator against any unauthorized reproduction, performance, or exhibition of his work; consequently, the writer or composer generally reserves some pecuniary benefits unto himself when he alienates these exclusive rights of reproduction and performance. In contrast, the artist sells an object, rather than intangible rights, much as if he alienated a suit of clothes he had tailored. There is nothing, practically speaking, that he can reserve unto himself, for the painting cannot be exploited in the broad sense of the word.[25]

If these arguments are correct, the *droite de suite* concept is justified because copyright is not at present a useful tool for artists; and as a consequence, federal policy is not even-handed in the support of the creative arts; therefore, corrective action should be taken.

Unfortunately, it is impossible to ascertain with any precision the extent to which the copyright law itself provides "less" protection for artists than for authors. First, whatever protection does exist is drastically underutilized by artists. It is clear that very few artists copyright their works in accordance with the requirements of the Federal Copyright Act. Although lawyers and dealers have tried to persuade painters and sculptors to avail themselves of statutory protection,[26] the artists themselves have been indifferent or hostile to the suggestion. A variety of reasons have been suggested to explain why artists refuse to put the circled C, the notice of copyright required by the Act, on their works. In many cases the reason is personal, a matter of the individual artist's taste; in some cases, however, the work itself would be marred or disfigured by the copyright notice, indeed, even by the artist's signature.[27] This is particularly true of contemporary abstract art; most artists of this genre deliberately refrain from signing their creations because a signature would be conspicuous and would detract from the total artistic effect of the work. Thus, frequently by choice and occasionally out of ignorance, contemporary artists rely on common-law copyright to protect their interests in their works.

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[24] De Sanctiis & Fabiani, *The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law*, 1967 (unpublished manuscript in UCLA Law Library).

[25] Hauser, *supra* note 4, at 2.

[26] J.B. CAHN, COPYRIGHT IN WORKS OF ART (1956) (Artists Equity Association); *2d Hearings on Art Fraud Investigation*, Office of New York Attorney General, at 28-29.

Because painters and sculptors have not relied on copyright protection, litigation has been rare. As a result, the extent of protection which present law might give them cannot be accurately gauged. Some of the rights which may exist under the copyright law and which would benefit these artists have hardly been touched by them. A few are suggestive.

The Right to Exhibit.[28] As long as the artist retains ownership and possession of the work itself, he necessarily maintains control over its exhibition. Thus he can loan his work to others for exhibition to the public, and can, in certain cases, obtain compensation for this. The copyright law, particularly under the proposed revision,[29] may even provide protection against uncompensated exhibition by the purchaser of the work if the painter or sculptor has retained the copyright.[30] This right of the artist to forestall display, however, is in jeopardy. The recent Supplementary Report on the General Revision of the U.S. Copyright Law includes this declaration: "As a general principle, we believe that anyone who owns a copy of a work should be free to put that copy on public display without first obtaining authorization from the owner of copyright in that work."[31] The new bill would support that view with important exceptions. Under present law, the extent to which an artist can control the display of a work, owned by another, for which he holds the copyright is not clear, but exploitation of a right after sale could result in tangible benefits to the artist.[32]

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[27] There is, however, some tolerance in the copyright law for avoiding the statutory notice where it will disfigure. Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (L. Hand, J.). The statute expresses the utmost tolerance for artistic needs. 17 U.S.C. § 19 (1964).

[28] *See generally* HOUSE COMM. ON JUDICIARY, 89TH CONG., 1ST. SESS., COPYRIGHT LAW REVISION, at 19-20 (Comm. print 1965).

[29] S. 1006, 89th Cong., 1st Sess., § 106 (1965).

[30] *See* Pushman v. New York Graphic Society, 287 N.Y. 302, 39 N.E.2d 249 (1942); N.Y. GENERAL BUSINESS LAW, Art. 12-E, § 224 (McKinney 1968).

[31] COPYRIGHT LAW REVISION, pt. 6, *supra* note 28, at 30.

The Right to Protect Against Imitators.[33] Under French law, the painter or sculptor has the right to obtain compensation from a blackguard who copies his style or technique, such as the precise color studies of Josef Albers. Such a right is probably more extensive than that which is presently understood as the right against infringement. But the paucity of artists availing themselves of federal copyright protection means there is extremely little in the way of case law on infringement and imitation.[34]

The Right Against Transformation and Destruction. Another potential but largely untested right of the artist relates to subsequent use of the work. Because the work of art is considered unique and because it is thought that the painter or sculptor must rely on the continued existence and integrity of the work to exploit his other rights, there may be an implicit right in the artist to enjoin the distortion or ruin of his painting or sculpture.[35] Although such a right is recognized in France,[36] there is again little case law to suggest whether it is also recognized in the United States. The existence of these unexplored rights does not mean, of course, that the copyright scheme does not discriminate. It may mean, however, that the federal bounty is at least potentially more even-handed than is generally thought.

Although these unexplored rights under the present copyright law may prove of some benefit to painters and sculptors, they can expect to receive much greater gains from the widely recognized copyright interest in reproductions of their works. The explosion in the sale of silk screen prints and posters, the new fashion of "multiples,"[37] and the improved techniques for distributing and selling reproductions[38] have established a market for works of art which approximate the market for books printed in limited editions.[39] As art is popularized and as the mass market is nourished and exploited, the reproduction rights for works of art will increase substantially in value. If painters and sculptors, like authors, receive compensation from the proliferation of their work through reproductions, the apparent discrimination of the copyright law in favor of authors and against painters and sculptors will be minimized. To be sure, the expansion of the market does not necessarily mean that the painter or sculptor himself will obtain a significant share of the money spent on art. The copyright protection will be more easily available, but it will still be up to the artist to make use of it. Picasso, Chagall, and Degas are examples of the new market; their performance, in terms of copies of their work sold, may well compare favorably with the numbers of copies of books sold by Faulkner, Conrad, or Sinclair Lewis. The new Copyright Act, following the New York State example,[40] will widen the artist's opportunity to exploit the market for reproductions; in contrast to prior law, the artist will retain reproduction rights in unpublished works unless he specifically transfers such rights with the sale of the object itself.[41]

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[32] What constitutes publication is uncertain because of the paucity of litigation; the effect of displaying a work in a gallery or museum is still not settled. M. NIMMER, COPYRIGHT, § 54 (1963).

[33] *See* Roeder, *supra* note 14.

[34] Fitzgerald v. Hopkins, 144 U.S.P.Q. 771 (Wash. Sup. Ct. 1965).

[35] M. NIMMER, COPYRIGHT, § 110.3 (1967); *contra*, Crimi v. Rutgers Presbyterian Church, 89 N.Y.S.2d 813 (Sup. Ct. 1949). Of course, it is difficult to assess the value of any or all of these rights to individual artists or to groups of artists. In terms of "real" discrimination, it is more helpful to compare, in terms of sales, the successful authors with the successful painters and sculptors.

[36] *See* Roeder, *supra* note 14.

[37] *See* p. 1340 *supra*.

[38] Most college book stores now sell prints by the thousand. In the SATURDAY REVIEW, Nov. 25, 1967, at 6, Marlboro Books offered a "Culture Clearance" where the purchaser could buy a Modigliani "Head of a Young Woman" on "genuine artists' canvas" or on heavy stock, or 20 full color reproductions of Chagall, Picasso, Roualt and others for $1. Posters Originals, Ltd. offers an Albers for $10, a Lindner for $5, a Warhol for $5, a Pollock for $10, and even poor Edward Hicks at $10.

Other marketplace phenomena undercut the easy conclusion that the present copyright scheme discriminates between artists and authors. The author, after all, normally obtains all his income from the royalty on successive sales of "reproductions" from his manuscript. The artist, on the other hand, usually obtains a lump sum payment for what constitutes his manuscript—the painting or the sculpture. The different methods of payment may reduce the apparent discrimination. An author who sells 50,000 copies of a novel and who receives a royalty of thirty cents per copy obtains $15,000 as the copyright reward for his work over the period during which the books are sold. An artist of the same class as an author selling 50,000 copies may not sell a major canvas for more than $5,000, but the money is usually immediately available. Even though he does not have the right to a portion of the proceeds on resale unless he contracts for it, he can obtain interest on the price paid for the painting. Thus, a painter who sells a painting for $5,000 today is as well rewarded as an author who must take ten years to obtain twice that sum through royalties.[42]

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[39] *See* Spencer, Review, ART AND ARTISTS, March 1967, at 52-54; pp. 1340-41 *supra*.

[40] *See* note 30 *supra*. In France, the rights of exploitation remain with the creator unless they are specifically waived. Law of April 9, 1910, modified by March 11, 1957, Art. 38. [1957] J.O. 2723, [1957] B.L.D. 197.

[41] A proposed copyright bill, S.1006, 89th Cong., 1st Sess., § 202 (1965), removes the distinction between common law and federally protected rights as far as the presumption of transfer is concerned.

Finally, it is difficult to assess the real effect of discrimination by the federal copyright statute without determining the impact of other federal statutes on artists and authors. For example, the tax code may tend to favor painters and sculptors over authors. Painters and sculptors, with more recognizable objects to manipulate, may have greater power than authors to arrange expenses and charitable deductions to minimize their income taxes.[43]

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[42] Of course, a major source of potential revenue for authors are such subsidiary rights as motion pictures and television. It is hard to envision an equivalent source for artists and sculptors.

There is another perspective for viewing the artist-author problem. Although neither the unsuccessful painter nor the unsuccessful author profit from the copyright system while they are unappreciated, an unsuccessful author can profit from the copyright protection if his work later becomes successful while an unsuccessful painter cannot, unless his painting is then reproduced. One cannot deny that this discrimination exists in the copyright statute. In terms of government policy, however, it is necessary to know whether the discrimination is important and what consequences it wreaks. One way of assessing the importance of the gap in coverage would be to look at the stock of paintings an artist keeps in comparison to the stock of manuscripts that an author hoards. To the extent that an artist warehouses his work, saving paintings, drawings, sculptures, and studies, he or his estate may be more capable of participating in the increase in value of his work than is the author, who may not store his writings because he generally has no reason to—the copyright protection preserves his future rights. However, although the author is able to garner a royalty on sales remote in time, the royalty rate is set by the original transaction involving the manuscript and may not be at a rate as high as that the author could obtain years later when his reputation was established.

[43] An artist may obtain inexpensive deductions by contributing works to qualifying organizations under Section 170 of the Internal Revenue Code, and substracting the fair market value of the work (up to 20 or 30 per cent of adjusted gross income) without realizing income. See Rev. Rul. 55-531, 1955-2 CUM. BULL. 520. The ability to deduct the fair market value of paintings furnished for promotional purposes under Section 162 is far less clear. A warehouse of art works may produce adverse tax consequences to the painter or sculptor if the IRS treats, say, a sculptor's accumulated work as "inventory." In that case expenses cannot be deducted currently but must be deferred until the work is sold. Where expenses are high and the chances of sale are slim, this could be disastrous.

The artist, like the author, is precluded from treating his work as a capital asset under Section 1221(2). One problem with valuing an artist's work for estate tax purposes was underscored by Ralph Colin in *2d Hearings on Art Fraud Investigations, supra* note 33, at 45-46:

> Mr. Colin: . . . [T]he artists have taken this matter in hand, and have now, I think, succeeded in establishing, at least, where the New York branch of the Internal Revenue Service is involved, that an artist's studio must be appraised on his death, in a manner other than two thousand dollars for a painting times a hundred paintings, therefore, two hundred thousand dollars. We have pointed out, at least to them, that anyone buying the studio would take 10 to 15 years, or sometimes more, and the most desirable paintings would be sold first, and the others left to the end, and mathematical calculations is in no sense a reasonable method of approaching this problem. So much so, that in two pending cases, I think I better not mention the States,—two pending cases, of one recently deceased artist and one re-evaluation on the death of the artist's wife, of the remaining studio pictures, the Internal Revenue Service has come to us and we have said that we would undertake to appraise, for the Government and the estate, the entire studio, if they would permit us to do it on our system. They have agreed with adopting our system, and our system was: what would a dealer, familiar with the market; familiar with all the hazards of the market; all of the time it would take to sell off the hundred or two hundred pictures; all of the realizations that the best pictures would go first and

A better understanding of the problem of assessing the relative discriminatory effect of the federal copyright statute may be achieved by considering the statute as a taxing device which delegates authority to impose a private tax on the sale of various items that fall within the coverage of the law. Authors, like governors of a Roman province, are authorized to tax purchasers of books in the amount of the royalty that they exact from the publisher. Each purchaser-reader must pay a certain amount of tribute to the author. Those who have a rich province do well; those who do not, do poorly. It may be true that the Copyright Statute does not specifically authorize artists to engage in the same kind of taxing process, and it may be that the *droit de suite* would provide a technique for artists to obtain equivalent rewards, the same provincial spoils; but that is only the beginning of the inquiry. For example, assuming that a governmentally endorsed tax should be imposed upon purchaser-users of paintings and sculpture as well as buyers of books, it does not necessarily follow that the proceeds of the tax should go to the particular authors or artists who created the works. Moreover, if there is a need for tax, it is not at all clear that the best government policy is to tax the users, as if they were automobile owners paying for the construction of more freeways. Whether authors obtain "more" bounty from the government than artists and what sort of corrective action is needed require more subtle analysis.

C. *The Droit de Suite and the Problem of Resales*

Even if there is discrimination in the federal legislative scheme which sharply hurts artists and sculptors, it is still questionable whether the art proceeds right is the correct way of righting the injustice. As a technique for providing economic security for artists, the *droit de suite* suffers from a fatal dependence on the resale of works of art. The *droit de suite* model assumes that works of art change hands rapidly enough to benefit painters who are still living or have been dead for a period shorter than the copyright term. If works of art do not move with some

some of them may never be sold; all of the facts, that during the intervening 10 to 15 years, he would have his capital invested on which he was getting no return, except the sales of the pictures, as they went along. Bearing in mind all of these things, we said the only way to appraise that is, what would a dealer, familiar with the school of work pay for the whole studio, realizing the problems he is going to have, to liquidate them. In one case, we have already completed the appraisal, and submitted it on that basis. In the second case, we are standing by, ready to do so, if the Government and the estate will do it. Now, there is a second point, that Mr. Johnson might have in mind, about which, neither we or he, or anybody else except Congress can do anything, and that is to raise a question as to whether an artist's estate ought to be taxed at all. This I'm afraid I cannot do anything about. But we can, and are helping the artist put realistic evaluations on his estate, rather than just the multiple of a hundred times two thousand dollars.

frequency from owner to owner, then the art proceeds right would be a waste of legislative energy.

Unfortunately, little is known about the rate at which paintings change hands.[44] Apparently the likelihood that a painting or sculpture will change hands within the copyright period is relatively small. Moreover, if gift transactions and, as in Italy, non-profit sales are not counted for *droit de suite* purposes, the likelihood is even smaller. An attempt was made through the use of *Art Prices Annual* to determine what percentage of artists whose works were sold at major auction houses in the United States and Europe were living at the time of sale or had died within fifty years of the transaction.[45] It was assumed that all of the paintings sold at auction were resales and not original sales of the paintings. The data suggests that an art proceeds right would benefit no more than 34 per cent of the artists (or their heirs) whose works were sold in any year.[46] There are, of course, certain problems with this sample. Works sold at auction are not a particularly good guide to the rate of resale of the sorts of work that do not get moved into auction. Moreover, houses chosen by *Art Prices Annual* are the best houses and their sales record may not be typical of the general market.

It does appear, however, that in European art houses a substantial resale market exists for the works of living, or only recently deceased, artists so that an art proceeds right is not meaningless.[47] A better evalu-

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[44] For some statistics in the French experience, see Schulder, *supra* note 4, at 22-23.

[45] The cut-off period was based on the copyright term which is most likely to be enacted in the proposed Copyright Revision Bill. The term will be life plus fifty years (except in limited circumstances).

[46] The following table was generated:

	1963-1964	1964-1965	1965-1966
Total number of artists whose work was sold	1144	1261	1431
Number of artists living at the time of sale (percentage of all artists whose work was sold that year)	145 (13)	179 (14)	164 (12)
Artists dead less than 50 years before sale (percentage of all artists whose work was sold that year)	229 (20)	264 (21)	315 (22)

[47] A recent report of the Commissaires-Priseurs (DOSSIER DE LA CHAMBRE NATIONALE DES COMMISSAIRES-PRISEURS SUR LE DROIT DE SUITE AUX ARTISTES (1964)) demonstrates that a substantial portion of the proceeds go to those few artists whose art sells for more than 20,000 francs per work. Averaging the sums for 1961-1963, the following conclusions can be drawn: For living artists, 25 per cent of the *droit de suite* proceeds (15,000 francs) went to 10 artists while the other 75 per cent went to 306 artists; among artists dead at the time of sale 40 men (whose work sold for more than 200,000 francs) obtained 135,000 francs while the remaining 174 artists obtained 165,000 francs.

ation of the gains accruing to artists under the French *droit de suite* would be obtained by determining the kinds of art sold at auctions and the value of those works produced by contemporary artists.[48]

An attempt was made to correct the more outstanding deficiencies of the *Art Prices Annual* sample by obtaining information from American dealers and businesses selling contemporary paintings and sculpture predominantly by non-auction techniques. The information received suggests that the gallery resale market is limited for the works of contemporary American artists.[49] If the function of the art proceeds right

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[48] Figures in the report of the Commissaires-Priseurs, *infra* note 55, suggest that the proceeds in France are enough to cause worry about Paris' position as a locus for major art sales. The report states that the cost of selling a painting in Paris is 20 per cent of the sales price (all fees and taxes included) while in London the fee is only 15 per cent. The Commissaires-Priseurs conclude that the charge is especially damaging in diverting important paintings and that only the effort expended and the confidence inspired by Commissaires-Priseurs themselves permit Paris to continue to fight. However, the fight becomes more and more difficult as the weapons become unequal. The artists' associations admit the high cost of selling in Paris but contend that the fault lies with other government taxes.

[49] Galleries in major cities throughout the United States were asked questions concerning the dollar volume which flowed from sales of work by living, or recently deceased, painters or sculptors. The galleries were also asked to estimate the percentage of sales which were not "first sales"—usually consignments from the artist to the gallery. The response from the galleries was not overwhelmingly enthusiastic, in part because the questionnaire asked questions calling for "confidential information," in part because many galleries did not feel like answering. Despite the weak response, enough of the questionnaires were returned by the galleries to provide some idea about the extent of resales in houses which are basically not auction establishments. The following table summarizes the information provided by five galleries. The galleries represented are in New York, Los Angeles, and San Francisco. Two of the galleries deal in extremely modern art and one does some auction business.

	Gallery A	Gallery B	Gallery C	Gallery D	Gallery E
Per cent of sales by living artists or artists who died during 20th century	100	100	15	40	80
Percentage of sales based on consignment	50	90	20	80	30
Percentage of sales which are resales:					
a. of works purchased outright from artists	30	2.5	0	10	20
b. of works consigned by or purchased from third parties	10	2.5	40	10	0
Total values of resales per year	N.A.	$2,600	$500,000	N.A.	N.A.
Percentage of resales:					
a. Sold for more than $2,000	50	0	60	20	N.A.
b. Sold for more than $5,000	10	0	40 (includes auction sales)	10	N.A.

is to compensate living and recently deceased American artists, then the slim resale market has to be cut again to determine the relevant dollar volume attributable to sales of their art works alone. In sum, the results of interviews and questionnaires suggest that the resale market is not a large one, that most purchasers do not buy predominantly for investment purposes, and that works of art pass by inheritance or from collections into museums. If they are sold, they are normally sold at the death of the owner after a rather long period of holding.[50]

Thus there is good reason to believe that the assumptions underlying the *droit de suite,* based as they are on romantic nineteenth-century notions about the artist in society, are not valid in the United States. As a consequence, the charitable motive for an art proceeds right loses something of its emotional strength. This is not to say that young artists are prosperous, or that excellence is immediately appreciated, but that several factors have changed the relationship between the artist and society in a way which makes an art proceeds right less necessary. The "discovery" of the impressionists and post-impressionists in the early twentieth century has altered patterns of acquisition by individuals and museums.[51] Partly as a result of the surge in values in the late nineteenth century non-academic work, collectors, galleries, and museums have hedged against the future by buying works of artists when they are less well-known and less expensive. This hedging operation has created a greater market for the lesser-known avant-garde artist thus leveling out the prices for his work over his lifetime. Further, we have learned that Blackstonian theory may be as misleading in art as in law. Value is as culturally determined as constitutional doctrine. The *droit de suite* pretends that true value is "discovered" rather than the partial result of fashion. At one time (perhaps in 1920) the *droit de suite* could have been viewed as a pension plan, welfare fund, and legacy for artists and their families, who, unlike the middle class, could not be counted on to set aside savings for a rainy day. The *droit de*

Although the figures are based on only a few galleries, they appear to represent the kind of art market found in America because they conform with the responses received in interviews with art dealers, museum curators, and collectors. Moreover, a high proportion of the market for the resale of art works represents paintings and sculpture of non-Americans, which suggests that American artists may expect to receive little benefit from an art proceeds right.

[50] In the distributed questionnaire comments were elicited from dealers on the beneficial quality of the *droit de suite*. The answers were uniformly negative. A representative of the Leo Castelli Gallery said that an art proceeds right would produce "chaos and irreparable bitterness; the art community would become a battleground." One gallery representative noted, "I'd forget this nutty idea if I were you and chalk it up to good intentions." The *droit de suite* would "ruin the art market though doubtless be a boon to the legal profession by way of long involved suits."

[51] This is made clear from a survey of auction annuals.

suite was a method of obtaining forced savings in the future. The artist's work would appreciate as the artist grew more in need of welfare: the *droit de suite* could be his salvation. In the United States, however, the sales of multiples, drawings, studies, and versions, and the increased acceptance of reproductions as art provide painters and sculptors with a means for profiting from the appreciation in value of their work that appears to be more effective than an art proceeds right. In addition, the poor resale market in American suggests that an art proceeds right would be of little benefit to the painter or sculptor. Only where the object created is subject to multiple transactions will the art proceeds right return a benefit to the artist. Even if the model were applicable to some portion of the American art market, its value is undercut by the probable insignificance of most of the proceeds and the problems of collection.

III. Some Guides for Alternatives

The basic goal of the art proceeds right is to provide greater economic security for painters and sculptors in an equitable manner; the *droit de suite* concept does not perform this function adequately. As a prominent French art critic (who wished to remain anonymous) has recently said, "The artists or artists' families who really need to be helped do not sell or sell at low prices and therefore do not receive any funds from the *droit de suite*." What is needed instead are some governmental policies more suited to the modern art market. The analysis and suggestions which follow are based on several personal but not excessively controversial assumptions which seem to me to be appropriate guides for developing legislative alternatives: (1) the working of the marketplace should be improved so that voluntary action rather than continuous government intervention will produce the desired results; (2) legislative policies are better if more rather than fewer citizens are benefited; (3) cost and administrative convenience are significant considerations; (4) legislation should disorder existing arrangements as little as possible.[52] While an exhaustive exploration of these rough guides in the context of a federal policy designed to encourage painters and sculptors is outside the scope of this paper, it will be worthwhile to examine some aspects of the guidelines as applied to the relationships between artists and dealers and museums.

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[52] The *droit de suite* has been criticized on all these grounds. It is cumbersome and requires an expensive enforcement bureaucracy; it is prceived as an effect on the international art market; and it is not particularly rational in bestowing rewards.

A. *Subsidies for Artists*

Federal assistance for artists may be warranted because of the distribution of cost burdens in the art market.[53] If it turns out that artists are the biggest contributors to museums, that artists pay out of their own meager hides for the education of the public, that artists have to support dealers, and that artists subsidize catalogues and other books on art, some governmental action might be necessary to change the situation. Dealers, museums, book publishers and others spend a great deal of time emphasizing their self-sacrificing services. They suggest that a large share of their costs are attributable to the exhibitions they offer the public at little or no charge, and that if the public paid its way, a substantially higher entrance fee would have to be charged. Museums, like universities comparing tuition charged to actual cost of educating a student, make much of these "free" exhibitions they provide the public and artists.

In actual fact, a substantial part of the costs of the exhibition may be borne by the artist, not the dealer or the museum. When there is a one-man show at a gallery, the artist often absorbs the cost of publicity, framing, hanging, and opening night festivities; in fact, he may be charged a fee which includes an aliquot portion of the rent. The dealer contributes his space and other fixed costs.[54] The artist, of course, furnishes the art work. In the case of a museum exhibition, the costs which the artist absorbs are not so obvious. But a feature exhibition, such as the recent "Sculpture of the Sixties" show at the Los Angeles County Museum of Art, illustrates the point. About fifty living sculptors took part in the show, some absorbing the expense of creating an object precisely for the exhibition. The show, for the most part, was held in the enclosed Lytton Gallery with all viewers, except museum members, paying an extra fee to see the special exhibit. It was clear that the viewers were coming to see that particular show and were willing to pay a certain fee to see it. The proceeds went entirely to the museum. Similarly, the catalogue, which enjoyed a brisk sale, financially benefited only the museum in an immediate financial sense. Where the artist could bargain for a portion of the proceeds but does not, he is also making a contribution to the museum. If Jackson Pollock's family said that they would only allow his retrospective to appear at various museums if they received ten per cent of all proceeds, the museum directorate would probably accede. The price of admission would be raised, or the museum would be required to absorb the additional expense. In either case, the subsidizing quality of the artist's contribution would be shifted.[55]

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[53] The ICC and regulation of railroad rates and rebates to shippers might serve as an example.

[54] Most of the material in this section is based on my interviews with representatives of the art world.

The significant point is that there are more costs involved in the process of distributing and exhibiting art than are immediately visible in terms of payments for paintings, museum admission fees, and budgets of galleries and museums. There is a substantial additional cost which is now absorbed, by and large, by the artist. The cost cannot evaporate; it must be borne by someone. To be sure, this extra cost varies from situation to situation. And where the exhibition is clearly an investment for the artist and the investment value is increased by encouraging more people to attend through a lower or nonexistent admission price, the artist, like the gallery, may jointly wish to suppress any fee. Sometimes the dealer or the museum will want a large turnout even though the artist does not: for example, the dealer may represent an artist whose works are offered for sufficiently high prices so that the admission fee is not a barrier to entry; but the dealer also has cheaper stock of other artists which he hopes to sell. Sometimes, where an aura of exclusivity is desired, both the artist and the museum or dealer may hike the entrance fee to exclude the masses.[56]

The implications for government policy are several. First, there is the need to discover what the costs are and how they are distributed. If certain costs should not be borne by the artist, there must be some technique for distributing them to others. This may in part be a matter of improved information and a better playing out of private forces. But it is quite unusual for an artist to seek a portion of the proceeds produced by a museum show, catalogue sale, or a gallery admission fee. A government could decide that it is undesirable for any of the participants directly involved to bear certain costs: it is bad for the museum because it already makes heavy demands on a narrow group of supporters; it is bad to rely on the viewing public because this will discourage visits to museums and galleries; and it is bad for the artist because he may be the participant least able to bear the cost. That leaves primarily the government. Perhaps it should bear the costs of museums or galleries which are now carried by artists. In the "Sculpture of the Sixties" show, for example, some system might have been worked out for compensating the participants in the exhibition while passing the expense to the viewers, to the members of the museum, to the county, to the state, or to the nation. At least the question should be clearly met: why are artists expected to finance such a glorious show when they should be paid for their troubles?[57]

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[55] During the interviews, one museum director said proudly that the catalogue for a new one-man show would feature a special lithograph, supervised by the artist, pasted to the cover. The lithograph itself is close to being "original" in terms of the requirements established by the Print Council. Only a limited edition will be made available. Yet, the museum is charging $1.50 for the catalogue and predicting that there will be a substantial loss. It has not made any market study of what price the catalogue could command, what difference it would make if the artist initialed the lithographs that he had supervised, or what difference it would make if they paid the artist some royalty for the work he is doing. The museum considers this is a great piece of public charity on their part. It may well be. But the greatest donor is the artist.

[56] The subsidy quality of the artist's financial arrangements are particularly apparent in the traditional commission and consignment arrangement artists have with dealers. In a particular show, or with a particular stable of painters, the dealer's investment is relatively small compared with the investment of the painter. Because the dealer's investment is small, his incentive to realize on the paintings is affected. That is not to say that it is affected a great deal, or that it is a calamitous structure; only that there is a somewhat lessened proclivity to advance the painter's sales and reputation. The Vincent Price Collection of Sears, Roebuck and Co. may be taken as an example of the merchandising of art where there has been a capital outlay by the merchandiser and a necessity to produce income from the investment. The artist's subsidy to the dealer reduces the dealer's necessity to do precisely what the artist expects him to do. It may be possible to study the difference in marketing techniques between dealers who purchase and resell and those dealers whose business is largely on a consignment basis. Promotional aspects, attempts to expand and sustain the market, and the development of various sorts of exploitation might be more characteristic of dealers who purchase rather than take on consignment.

Of course, the *droit de suite* may be viewed, in part as a technique for reimbursing the artist for his prior subsidization of the art market.[58] To be sure, he must suffer early in his career, but that is only because he has chosen a métier that requires heavy, early investment. The additional investment is returned through the art proceeds right. Once the public "understands" in the sense that it is willing to pay for his work, it compensates him for the extra investment he was required to put into exhibitions, catalogues, and the free loan of his work. Unfortunately, the *droit de suite* so imperfectly compensates painters and sculptors that it does little to relieve most artists of the costs they must bear in exhibiting their work. Additionally, the rewards of an art proceeds right are not distributed to artists in proportion to their expenses. A *droit de suite* may discourage painters who should not be discouraged; while it benefits galleries and museums that do not need to be benefited.

Second, to the extent that the *droit de suite* is intended to compensate the artist for society's lack of vision at the time of the first transaction, it would be better to spend money to improve society's insight. Indeed, this may be an educational function of the dealer or gallery which should be strengthened. Thus, if the government took a sum which is the equivalent of the aggregate *droit de suite* and invested it in an educational campaign or subsidized the efforts of dealers to promote artists, the gap in understanding which continues and lies at the basis of most notions of a *droit de suite* might be overcome.[59] Such education would not only benefit the artist by securing higher prices for his work earlier in his life, it would also benefit society by insuring earlier understanding and greater enjoyment of the art work involved. To be sure, the *droit de suite* sum might not be enough, but the fruits of such an enterprise would probably be greater than the fruits of a *droit de suite*.

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[57] Often, of course, the artist will benefit from the after effects of a museum exhibition, but that does not mean he should go uncompensated. Lawyers, architects, aerospace companies, all furnish some "free" services for promotional purposes. But for artists and sculptors, the institutionalization of the process of uncompensated exhibition has deprived them of the choice as to whether a show of his works should be income producing or not—and if so, the way in which he should modify his demand for payment.

[58] This is another more palatable formulation of the Blackstonian view discussed at p. 1349 *supra*.

B. *Private Bargaining*

In other areas of regulation where income distribution has been found inequitable, government policy has often aimed at strengthening bargaining power rather than intervening in specific transactions.[60] It may be that such an approach is totally out of the question in the art market, but it is certainly worth some scrutiny. Private bargaining does not require an elaborate rationale; if an artist arranges for additional future compensation by contract, he does not have to say it is "just" or "necessary" or "encourages the arts." Private contractual arrangements, indeed, are the normal method for fashioning patterns and levels of financial reward. It is perfectly justifiable for artists, like television personalities, to obtain residuals in their works. It is perfectly justifiable for artists, like motion picture producers, to tax each subsequent use of a print or a painting. But because symmetry is desirable it does not mean that the government should impose it. Government legislation might be directed at ways of improving the possibility that fair, voluntary bargaining takes place. This may be a matter of merely furnishing information; it may be a matter of less subtle techniques of intervention.

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[59] One possible model for such an enterprise is the French Caisse Nationale des Lettres which serves as a governmental foundation to subsidize and promote certain literary works. The funding for the CNL is derived from several sources: (1) an additional fifteen year copyright period for literary works with the proceeds going to the CNL; (2) a special tax on certain publishers; (3) a special tax on royalties from authors; (4) additional government appropriations. The fund is used for the following purposes: (1) to support and encourage literary activity of French writers through scholarships, purchases of works, and other subsidizes; (2) to subsidize the publication of important works of scholarly or literary merit which would probably not be commercially published without such subsidy (dictionaries, correspondence of men of letters, scholarly works, etc.); (3) to grant relief to old and needy authors and their families; (4) to protect French literary works from ill use and desecration even after they are in the public domain. In 1967 the CNL had a budget of approximately $600,000. Approximately $50,000 went for scholarships and grants; about $15,000 to literary magazines, $200,000 in loans to publishers.

[60] The most frequently cited, but not most relevant model, is the National Labor Relations Act. In the civil rights field as well, the government has often acted by providing covert support for representatives of bargaining groups, such as the Urban League and the NAACP.

What is immediately clear from a survey of present arrangements in the United States is that extremely few artists have written contracts of sale or consignment;[61] and it is not much of an exaggeration to say that no contract includes a specific art proceeds right term. While this may be the result of a legal incapacity, artists offer several other reasons. The first is the strong influence of custom or contractual arrangements in the sale of art. It is a business that in many ways tries not be a business (at least so far as the artist-dealer relationship is concerned). There are negotiations about certain issues: what will be the amount of commission, whether the artist is paid a monthly advance or works on an output contract, who pays for framing, the dealer's publicity costs, opening costs, and hanging costs. There may even be loose consensus on the amount of the selling price, but the sort of purchaser and the terms of the contract of sale are normally outside the artist-dealer negotiations. The negotiations often do not relate at all to the most important aspects of the transactions. The artist has a vital interest in where his paintings are placed and what use is made of the work after it is sold, but these terms are rarely bargained over.

Because of the strong influence of custom in the contractual practices of the parties, very few artists have given consideration to fashioning different arrangements with their dealers or ultimate customers. The pervasive impact of existing practices gives rise to various theologies for the lack of change. First, although it is a popular pastime for artists to complain about their dealers, they do not normally conceive of the

[61] *See* testimony of Ralph Colin, *Hearings before N.Y. Attorney-General, supra* note 26, at 52:

> It might interest you also to know, in view of some of the comments made here, about the tough contracts that the dealers insist on—we happened to have had a meeting of our Board last Friday to deal with a special matter. There were eight members of our Board present. I didn't know that this question was going to come up at this meeting, obviously. But incidental to another question, I asked our members what forms of contracts they had. None of the eight members of our Board, present at that meeting, had a written contract with any artist. Their general attitude was, we work out the terms by mutual understanding orally; we fix prices orally, and any time an artist is unhappy and doesn't want to stay with the gallery, he may leave, because we are convinced that an unhappy artist is not an artist who is going to produce good work. Now, please understand that I am not suggesting that this is a uniform practice. I know that many galleries have written contracts with artists, for terms of one, two, three, five years, but I can tell you that many of the most responsible galleries in New York don't have contracts with their artists.

need for intermediaries between them and the dealers. An analogy from the motion picture industry is apt: a show business personality does not depend on his producer or exhibitor to look out for his or her best interests; he hires an agent who negotiates the contract for exhibition. The agent tests the market for flexibility in various aspects of the producer-personality arrangement, bargains for better billing, for a different form of compensation and for artistic control over the end product. He is able to force the producer to differentiate among the various performers he employs. For better or for worse, the art dealer performs the role of exhibitor and agent. He may have short or long range interests that are different from and even conflict with those of the artist; he may be less concerned than the artist would be with increasing the artist's control over the use and disposition of a work of art that has left the dealer through a sales transaction. For the dealer, enforcing the art proceeds right and coping with the sales resistance it creates only causes headaches. Similarly, any conditions imposed on the sale which lead to limitations on usage or requirements of display restrict the market.

A second theology relates to the "power" of artists. Many of the participants in the process think that artists and sculptors could not get changes in their arrangements even if they so desired. As a consequence, they give little thought to the form change might take. The prophecy of powerlessness is self-fulfilling. The various movements, dating from WPA and still lingering in the shape of the artists cooperative associations, have exceedingly little force in the marketplace. Indeed, the feeling of powerlessness extends to the point where even powerful individual artists do not exercise their strength, although it appears that they could exact such benefits as an art proceeds right, reproduction rights, exhibition rights and others.[62] There seems to be no recorded instance of collective action which has changed the policies of a dealer, gallery, or local market. The attempts to exercise power have either been on an individual basis,[63] or on a mass basis, like the Artists Equity movement. Part of the reason is that a large number of artists, including artists that have a certain reputation and power in the market, have only a fragmented idea of the sorts of matters they could negotiate about with their dealers. And even if the art proceeds right became a matter of negotiation, it would almost certainly be in the context of other sorts of contractual provisions which would furnish a spectrum of techniques for enhancing the economic security of the artist and the dealer.

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[62] One major dealer of mass art in Los Angeles exacts an agreement from purchasers that he retains the right to reproduce. Often, after a painting is sold, it is recalled, photographed, and made the subject of thousands of "prints" for interior decorators. Neither the purchaser nor the artist participates in the proceeds.

[63] Picasso's insistence on retaining almost all property rights in the Museum of Modern Art's "Guernica" is one example.

The range of issues which are or could be subjects for negotiation is quite large. The most obvious is *reproduction* rights.[64] To the degree that the receipt of royalties makes a painter more like an author, such rights are a supplement to the *droit de suite*. Under American law, except in New York,[65] the sale of the object carries with it the sale of the common law copyright unless the copyright is expressly retained. That simple action, retaining the copyright, is taken by some artists and dealers, but extremely few. In some cases the dealer retains the copyright allowing him to make reproductions in the future without compensating the artist. There is some indication that museums would resist purchasing objects without purchasing copyrights, but such resistance would probably crumble in the face of demands by artists for their copyright rights. Indeed, museums have been known to embrace special conditions of a far more exotic nature when they are imposed by contributors. Much is made of the inconvenience that attends retained reproduction rights. One way out is the method employed by the American Society of Composers, Authors and Publishers (ASCAP) —policing public performances of music; however, this is extremely expensive and would be suitable for artists only when reproductions become widespread and policing worth the cost. Other methods are less burdensome.[66] For example, it is contended that retention of reproduction rights would create too much bother and confusion for people who wanted to reproduce the painting. But even now the reproducer must check with someone, normally the owner of the painting or the museum before he copies the work. Museums normally require that the reproducer establish a credit line as do collectors, although museums often waive any charge. An artist could require that the museum collect a certain fee for reproduction, perhaps geared to the size of the publication. At first, until it is clear how such a system would work, the artist could relieve the private collector or the museum from liability for non-collection of the royalty, leaving the arrangement up to the bona fides of the owner of the painting.

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[64] The Association of Art Museum Directors recommends a fee schedule. REPORT ON COMMITTEE ON REPRODUCTIONS (1962). No fee would be charged for publication in "art magazines or other publications including art pages" such as in *Life*, *Time*, or *Look*. For reproductions in advertisements, "permission to reproduce works by living artists will be subject to written permission of the artist and to any reproduction rights he may have retained." In cases where such rights have been retained by artist, reproduction fees will be payable to him in such sums as he may stipulate. Where no such reservations have been made by the artist, a flat fee of $250 will be payable to him by the advertiser. This will be in addition to the fees and charges payable to the museum.

[65] *See* note 29 *supra*.

[66] *See* Plaisant, *supra* note 9, and De Sanctiis & Fabiani, *supra* note 24.

Other subjects for bargaining include *dealer practices*.[67] The way in which the dealer deploys his budget has serious consequences for the artist. Changes in the advertising budget, the decision to keep a gallery open, the guarantee of exhibition, the turnover in shows—freedom in all these respects is permitted the dealer because he maintains his stock without strings. Few other dealers who have exclusive arrangements with suppliers can act with such immunity from supplier sanctions. When an artist agrees to be represented exclusively by a gallery he makes certain assumptions which might be articulated and made explicit in a contract for representation: for example, that there will be a maintenance of the existing advertising budget or that it will increase at a certain percentage each year. Also, there could be a guarantee to certain artists who are represented that there will be one-man shows each 12 months and gallery group shows once a year. Two frequent complaints are that artists lose track of their work or fear that the gallery will be slow to pay them. Certain contractual techniques might alleviate these complaints. Artists could require that the gallery maintain, in an accessible place and at the gallery's expense, a registry of all work on hand by artists. This central file would be open to the artist for his inspection at set times. Artists could also require that a penalty clause be inserted which would add five per cent to the monies due for each three month delay in submitting payment.

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[67] *See* testimony of Alvin Lane, *2d Hearings on Art Fraud Investigations, supra* note 26, at 69-70.

> I would like to take up the question of the artist. The artist does have a problem with the gallery. I have written to the Attorney General and asked him to expand these hearings to take into account—perhaps not under the same subject, but maybe a corollary to it—the problem of the artist. For example, there should be uniform methods of accounting. An artist leaves his work at a gallery. Very often he is not told to whom it was sold nor does he know the price of the work. He puts a minimum price very often on his work. He said, "I am willing to take $2000 for this." That doesn't mean he wouldn't be happy if he got $3000. There are a lot of artists in the Association and out of the Association—that is who deal with all types of galleries who cannot get an accurate accounting of where their work is; who it was sold to; what it was sold for. I think just as a matter of pride, when a man creates something he should be able to trace the pedigree of it. He should be able to know who he sold it to. But, more, he should be able to check his accounting.
>
> There are problems with some galleries as far as prompt payment to the artist. I have had instances where people have called me, where their work has been sold and they cannot get paid for long periods of time. I don't know whether this is true in other industries. I imagine it is. But it is prevalent in the art industry, and I think licensing can control that.
>
> I also think that the galleries on the whole have not properly protected the proprietary interest of the artist. When they sell their work, for example, there is no reason why the galleries, who are really in a fiduciary relationship with the artist, shouldn't in the bill of sale or in the collateral agreement, reserve certain rights for the artist, such as prohibiting his work from being shown on television or displayed distastefully or whatever it is. This can be done contractually. It doesn't have to be by law. I have no objection to the law that is proposed. But I am not in favor of a lot of laws. I think the law should be kept to a minimum. I prefer something that is more flexible, and where you can regulate where regulation is needed and you can cease regulation as soon as it isn't needed.
>
> Now, the galleries have failed, in my opinion, as a mass in protecting the interest of the artist. There is no professional group I know of who has treated their clients more shabbily. Now, I am not saying they didn't make a lot of money for their artist, and I am not saying that a lot of artists haven't treated the galleries shabbily. They have. Galleries have spent lots of money promoting an artist, and as soon as they reach a certain fame or price, they will shift off. And the man who has invested the time, effort and encouragement, loses a valuable asset, so to speak. It's a two-way street, and I am not going to say the galleries are all wrong and the artists are all right. I am trying to address myself to particular problems. The artist should know how much he made; he should be paid promptly; the gallery should publish with their bills certain reservations that the artist is entitled to. At least tell the artist what his rights are and let the artist make a decision whether he wants to retain them.

The art proceeds right concentrates on the immediate financial interest an artist has in the fate of his work. But various non-financial controls may be more important to the artist's welfare. For example, an artist has a great stake in the manner his work is displayed by the dealer. At present, the dealer has complete discretion over the placement of paintings within the gallery. If the gallery does not have shows, or reserves a section of the gallery for selections from artists represented, some assurance can be built into the contract that there be regular display of each artist's work of art.[68] Furthermore, the artist may require the dealer to impose certain exhibition obligations on the purchaser, such as making the works available for display in museum shows. The artist might demand the right to limit the number of times a painting could be loaned and the duration of each loan. The artist might wish to exercise some censorship over the occasions on which his work is exhibited; there are related rights similar to the "moral rights" which exist in France and many other countries.[69] The artist may wish to exercise contractual control over modifications of the work of art, such as changing its colors so that it will be a better match for the owner's furniture and wallpaper. The artist may seek contractual assurance that the purchaser will not mutilate or destroy the painting or that the purchaser will adequately protect the work, periodically relining it, for example, or the artist may even demand that the work be destroyed in a certain number of years.

Clearly, one of the harshest blows for artists occurs when a gallery decides to close. The artist may wish to protect himself by obtaining some assurance in his contract with the dealer that the gallery will continue to operate. For the artist, the choice of dealer is extremely important; his tie to one agent forecloses other arrangements. He becomes closely identified with a certain market and certain purchasers. For him, the dealer's decision to close can be quite cruel. It may mean he has to find another dealer, which may be difficult, or fend for himself, which may be impossible.[70] What protection is there? First, there ought to be a notice requirement. A contract could provide that a dealer must give at least three months notice before he closes up shop. This would give the artists involved some opportunity to persuade the dealer to change his mind, to encourage some quick additional financing, or to make other arrangements. Second, the artists may have some interest in the liquidation of the gallery's assets. In a sense, the artists have become quasi-partners; their continuous subsidy and investments in frames, materials, etc., have been a substantial factor in the gallery's financing. The artists may have considerable interest in the mailing list of the gallery and other records that may permit them to continue the business. They certainly have an interest in their paintings and in the gallery's accounts receivable, at least to the extent that their commissions depend on the monthly installment payments by the purchasers of their paintings. In sum, the contract with the gallery can provide for rights on liquidation. Because of custom, lack of experience, and a feeling of powerlessness, private contractual techniques for future participation in the increase in value in a work of art has not yet been adequately tested.

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[68] The artist may also bargain for billing in circulars and on-site promotional material.

[69] *See* Roeder, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors, and Creators*, 53 HARV. L. REV. 554 (1940). *See also* M. NIMMER, COPYRIGHT § 110.1 (1963).

The implications for government action of this absence of contractual arrangement are by no means clear. Were the art proceeds right felt to be significant and crucial to provide fair and just compensation, then the government might feel it necessary to intervene whatever the reasons for the failure of private bargaining. Government intervention would be more compelling if present contract law forbade artists from obtaining provisions that would improve their economic security. For example, certain provisions which bind future purchasers could be held to violate the rule against perpetuities, or could be characterized as "against public policy"; enforcement of certain provisions might violate various antitrust laws. Finally, even if such contracts were valid, the government might be required to intervene because enforcement was impossible without outside assistance. It is difficult to believe that the ingenuity of lawyers cannot surmount the problems surrounding the drafting of a private art proceeds right. To be sure, there are the hobgoblins of restraints on alienation, but they should be spurs, not obstacles, to the lawyer's imagination. For example, the artist could make his sale partially conditional; $20,000 cash with $5,000 more to be paid if the buyer ever sells the painting for $40,000 or more. Or the painter could sell the painting with a $2,000 lien, with payment due at the time of the first resale. As to the first purchaser, the artist certainly has adequate privity to require an out-and-out *droit de suite.* The artist can include in the contract of sale a stipulation that he receive three per cent of the proceeds of any sale.[71] Problems, such as lack of privity, arise primarily on subsequent sales.[72] A continuing restraint on the sale may violate the rule against perpetuities and certainly would be difficult to enforce. There are methods for solving this problem, but they may be so difficult and unworkable that they are no solutions at all. For example, an artist may relinquish his painting in a lease rather than sale form. The lessee would have a continuing lease, but would not be able to sell the painting without the painter's permission. The lessee would be able to give the work to a museum without obligation to the artist, but as to any other transaction, the painting would have to be rerouted to its creator or his estate. Or the painter could have an option to repurchase: a cloud on the ownership of the work which could only be dispelled by paying him a sum which would be similar to the *droit de suite.* To make the arrangement more palatable the artist's lien could be set at 10 per cent of the increase in the painting's value, if the transaction involves more than $2,000. Under these circumstances, the purchaser would probably not be deterred for fear of losing his original investment, since he reaps 90 per cent of all profits which he makes on his investment. The problem of policing is still a nagging one. Again, there must be an element of trust and self-enforcement. The contract could stipulate where the proceeds should be sent. If a purchaser fails to pay, the artist would have a lien on the painting for the amount of the art proceeds right. Where a gift to a museum was made, the artist could agree to take half the normal share due him or waive the proceeds entirely. Government intervention to enforce the art proceeds right might be warranted if artists could negotiate clauses giving them such a right but had no way to collect the money when their work hit the Top Ten. Existing private models for enforcement, such as ASCAP, are probably too bulky and expensive for artists. Indeed, a close study of the French experience would probably indicate that the ASCAP-type agencies which were employed to enforce the artists' rights created a substantial drain on the income from the *droit de suite*.[73]

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[70] The problem is analogous to bargaining issues which occur where there is a decision of a manufacturer to terminate his operations. Employees have increasingly been successful in arguing that an employer has a certain trust responsibility when he offers a position, changes an employee's training and skills, and shuts off alternative opportunities. *See generally* Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263 (1965). There was, of course, abundant testimony which pointed out that it would be simplistic to place all blame on the dealer. *See* note 16 *supra*, testimony of Ralph Colin.

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[71] *But cf.* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[72] The likelihood of multiple transactions within the copyright term is unlikely. *See* p. 1349 *supra.*

IV. Conclusion

What do these changes in style and the marketing of art imply for government policy?[74] First and most important, there is a need for vast improvement in the operation of the marketplace. The artist, ignorant of his rights, saddled with the concept of powerlessness, has by no means explored the limits of his contractual arrangements with dealer and purchaser. The government can play a crucial role in eliminating this informational gap. Just as the Department of Agriculture and the Small Business Administration do in their areas, some governmental agency, perhaps the National Endowment on the Arts, should provide technical assistance to artists and sculptors. Such technical assistance would include information about the income tax—in particular allowable deductions—information about new materials and new processes, information about the great variety of bargaining relationships among artists and dealers, information about firms that would reproduce their art, and information about new markets for works of art. At present, most artists, whether they are trained at universities, colleges, or art schools, emerge with only the barest idea of any of these matters. They are saved from poverty by the general level of prosperity in the nation.

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[73] The authors' society retains approximately 30 per cent as a commission. Thus for a $5000 painting, if the *droit de suite* were fixed at 3 per cent (the French rate), the tax would yield $150, of which the artist would get $105.

[74] There is an important but subtle relationship between the kind of art produced, the demand profile, and the channels of distribution. No matter how persistent and self-sacrificing artists are, they are controlled to some extent by what embodiments of their creativity can be sold. There is a dwindling market for religious triptychs because there is a dwindling number of massive churches. If existing merchandisers of art were not sufficiently resilient to include the financing and sale of massive pieces of sculpture, then that style might be short-lived. If artists are not employed to design freeway approaches, if they are not consulted in the design of cities and public places, if they are eschewed by industry out of lack of information and knowledge, then restrictions imposed by the collector—individual, corporate, or government—will continue to be felt in the development of style. Economics and aesthetic experimentation should accompany each other, with governmental encouragement. Indeed, this is occurring at the present time in New York, Chicago, and Los Angeles. *See* THE ARTS IN CALIFORNIA, REPORT TO THE GOVERNOR 74 (1966).

An educational role may seem trivial to a government that is better organized to pass a statute than to implement a policy, but it could be extremely worthwhile. Second, the government should expand the market for works of art, particularly contemporary American paintings and sculpture. The government can do this by increasing its own purchases of art or increasing, by regulation, the investment in works of art by others. The program of purchasing American art for embassies abroad might be extended to federal offices in this country. The policy of requiring a small percentage of public construction funds to be spent on murals, paintings, and sculpture should be more rigorously fostered and administered. Greater federal encouragement, particularly through the State Commissions on the Arts, should yield increased buying of contemporary works by state and municipal governments. The National Endowment on the Arts can encourage more elaborate aesthetic zoning, more parks and public places with room for sculpture gardens, better tax breaks for office buildings which are exemplars of good, rather than horrid, taste. The government can also continue to increase the market for art by fostering public higher education, thus expanding the number of citizens who become potential buyers of contemporary art. Third, the National Endowment on the Arts should explore in great depth the way in which the private art market presently functions and how current trends may modify the income patterns of various schools of American artists. More information is necessary about who the new purchasers are; whether individual collectors, corporate collectors or museums predominate; what is the extent of the market for paintings at various price levels; and what is the capability of the dealers to ferret out new markets for the artists they represent. Fourth, the government should explore and develop new avenues of participation for artists in architecture and city planning so that novel forms of creative expression have compensating outlets. In part this may involve subsidizing production facilities which require extraordinary capital outlays.

The *droit de suite* cannot function as the cornerstone of federal planning. The fashioning of government policy in the area of the arts is difficult enough without the additional paralysis of reliance on outmoded ideas of the production and distribution of art. The rude intrusion of technology into the craft of the parlor and the rampant extension of the artistic imagination is rendering obsolete such notions as "paintings," "originals," "authentic." The shape of the demand profile is also changing. The practices of periodic resales and passing works of art from generation to generation are growing less significant as institutional, government, and corporate buying begin to become a greater proportion of the market. The pervasive idea of distinguishing between books and paintings must fade somewhat as the market for reproductions doubles and redoubles. What is most clear is that the government cannot define its policy on the basis of a nineteenth century view—or any fixed view—of the art market at a time when standards, and styles, and methods of sale are so quickly changing. That is the plague of the *droit de suite.* True, it offers a small solution to the problems of some painters. Yet the administrative problems it produces would probably outweigh its benefits and the government could better direct its energy in channels calculated to improve the economic security of the artist. In terms of its articulated goals, the *droit de suite* rewards the wrong painters with probably inconsequential amounts of money at the wrong time in their lives.

existing arrangements as little as possible. While an exhaustive exploration of these rough guides in the context of a federal policy designed to encourage painters and sculptors is outside the scope of this paper, it will be worthwhile to examine some aspects of the guidelines as applied to the relationships between artists and dealers and museums.

THE ECONOMICS OF THE PROCEEDS RIGHT

MICHAEL ASIMOW

Economic Aspects of the *Droit de Suite*

LEGAL RIGHTS OF THE ARTIST (M. Nimmer ed. 1971).

This material was originally published in *Legal Rights of the Artist*, M. Nimmer, Ed. (1971) in "Economic Aspects of the *Droit de Suite*" by Michael Asimow, and is reprinted herewith by permission of the copyright owner, Michael Asimow.

One who advocates the *droit de suite* as a means of providing social security to aged artists and their heirs makes certain fundamental assumptions about the art market. He probably assumes, for example, that the *droit de suite* would not unduly depress the market for the first sale of art works, for it is to this market that all artists must look for their livelihood. The *droit de suite*, reproduction rights and other forms of deferred compensation can be at best only the frosting on the artist's financial cake. Furthermore, the advocate of the *droit* surely assumes that it will not drive a large number of potential buyers out of the market for covered art works into uncovered forms of investment, such as Persian rugs, fine furniture, or signed letters of ex-presidents.

It is far from simple to assess the validity of these assumptions. The reports given us of the European systems are utterly inconclusive on the point. The Italian system has been moribund since 1950, the German system is too new, and the French system too limited to afford any valid conclusions about the actual effect on the art market of the *droit de suite*. However, it is possible to come to some tentative conclusions based upon conventional tools of microeconomic analysis.

In order to do this, the *droit de suite* must be recharacterized as an "excise tax." From the point of view of the buyer and seller in a transaction to which the *droit de suite* applies, the *droit* is an excise tax—simply a percentage of the purchase price which the seller may not retain. For present purposes, I am not considering a "plus value" system such as the Italian statute. The only difference between the *droit de suite* and an excise tax is that the proceeds (net of collection and distribution costs) are channelled to the artist rather than distributed for the benefit of all citizens. Therefore it would seem that the analysis ordinarily applied to evaluation of excise taxes is appropriate in the appraisal of the *droit de suite.*

The basic question which concerns us is the *elasticity of demand* for paintings (or such other art works as the *droit* might cover). A "demand curve" represents the quantities of a product which will be demanded at various prices. The higher the price, the fewer products will be sold. If the demand curve is "elastic" an increase in price of, say, 5% leads to a greater percentage decline in the quantity of the goods taken—say 10%. On the other hand, if the demand curve is "inelastic" the 5% price increase leads to a percentage decrease in the quantity sold of less than 5%. In other words, if demand is "elastic" the quantity sold will be relatively responsive to price changes; if it is "inelastic," it will be relatively unresponsive.

Determination of the elasticity of the demand curve is an essential ingredient in analyzing the desirability of the *droit de suite.* If the full amount of the *droit de suite* is added to the price (we will expore this assumption later), and if the demand curve is *elastic,* there will be a *decrease* in the amount of money flowing into the market for re-sale of paintings. Thus the net effect of the *droit de suite* would be to drive a disproportionate percentage of buyers out of the re-sale market for paintings and into some other form of investment. A reduction of the number of dollars flowing into the re-sale market *would presumably have a depressive* effect upon the balance of the market for paintings, right down to the original sale from the artist to his dealer or to the first buyer even though the *droit de suite* does not apply to that sale. Obviously the price paid to the artist at the original sale reflects the assumption by the buyer that a good market will be available for re-sale of the painting, and it seems impossible to escape the conclusion that a depressed re-sale market would lead to a depressed original sale market. Probably art buyers would fear an increase in the precentage of the *droit* in the future which would magnify the depressive effect. Of course, one might conclude that the equitable appeal of the *droit de suite* is so powerful that its enactment is desirable in spite of the fact that it might lead to a depressed market. However, all must agree that the *droit de suite* would have to sustain a substantially greater burden of proof if it would decrease the number of dollars available to artists in the original sale market.

What indications are available as to whether the demand curve for paintings is elastic or inelastic? The most important question usually asked is whether there are a substantial number of good "substitutes for the product." If there are, many consumers will switch to the substitutes in the event of a price increase. Thus the demand curve is likely to be elastic. If there are no close substitutes, most consumers will have to tolerate the higher price and the demand curve would tend to be inelastic. Are there a substantial number of close substitutes for paintings and sculpture? As to buyers whose motivations center on art as an investment there would seem to be many close substitutes for paintings and sculpture as an investment medium. The number of other collectors' items which tend to appreciate in value and will serve as a hedge against inflation are legion. Moreover, investors are notoriously price conscious. As a class they carefully compare the available rates of return and predictable profit from each alternative investment. Even as to buyers whose motivation is primarily aesthetic, there are often adequate substitutes for the few art forms which the *droit de suite* would cover.

Another indicator of elasticity is whether the price is high or low on the particular demand curve. As a matter of mathematics, it may be shown that where price is "high" and therefore quantity taken is "low," a small percentage change in price produces a large percentage change in quantity. For example, it was observed in a comparative study of excise taxes that the demand curve with respect to high-priced appliances tended to be highly elastic in part for for this reason. It seems certain that we are concerned primarily with sales of paintings whose price is relatively high on the demand curve for art. Only such sales would produce a large enough *droit de suite* to make the scheme worthwhile. And both Monroe Price and myself feel that a *droit de suite* should have a fairly high "floor" below which sales prices would be exempt from the *droit*—perhaps $2,000. Use of such a high floor would, however, limit the relevant market to paintings whose prices are at the high end of the demand curve and hence accentuate the elasticity problem.

Another factor which is relevant to elasticity is the question of whether the product consumes a large or a negligible amount of the consumer's income. Consumers are thought to pay little attention to price increases of products which consume a trifling amount of their income, such as spices. And it seems clear that costly works of art (the only ones to which the *droit* logically applies) will absorb a substantial percentage of a consumer's income. True, Norton Simon's income may be so enormous that the art treasures he purchases do not make a huge dent in his pocketbook, but most art purchasers seem quite concerned with price; in no event would the amount be a "trifling" one.

Finally there is the question of whether there are many uses for the product. A product with few uses or a single use is thought to have a relatively inelastic demand curve. This factor points to an inelastic demand for art, since works of art probably have only two basic uses—ornamentation and investment. However, the force of this factor seems minor, as compared to those factors already discussed, particularly substitutibility.

Our information about the actual demand curve for works of art is inconclusive. On our questionnaire to art dealers, we asked them whether the recent increases in sales tax made any difference in sales. Most said it did not, although a few said that the customer required the dealer to absorb sales tax in many instances. However, the sales tax is far from an apt analogy since it applies to all tangible products and tends to be taken for granted by consumers. In particular, it applies equally to all other forms of art or collector's items embodied in tangible form. Hence the factor of substitutibility was removed from consideration.

The writer's conclusion, therefore, is that it is quite probable that the demand curve for art re-sales is elastic. Therefore, again assuming that the entire amount of the *droit de suite* would be added to the price, it would seem that the *droit* would have a depressing effect on the art market, both re-sale and first-sale.

But would the *droit de suite* be added to the price? The conclusion of many who have studied excise taxes is that ordinarily part of the additional tax will be added to the price and part will not. This is a function of the fact that sometimes it is more profitable for the seller to absorb part of the tax than to pass it on. To the extent that the tax is, in part, absorbed by the seller, it has the effect of depressing factor incomes throughout the chain. Of course, in the first instance it depresses the income of the seller, but he may be in a position to recoup by depressing the price he paid—which may have been to the artist. It is thought that the persons with the least bargaining power in the chain are those whose incomes would be depressed the most. It is hard to escape the conclusion that this label best fits the artist himself who, if he is a relative unknown, often must accept whatever price is offered. Another way of expressing the same idea is to say that if the buyer cannot pass on the amount of the *droit* when he sells the picture, he should decrease the price paid to the artist by the present value of his future loss from the absorbed *droit*.

Considerable analysis has been given the subject of what is a "good" excise tax and what is a "bad" excise tax. For example, Professor Due lists five standards for evaluating an excise tax:

> (1) Will it interfere with the efficient functioning of the economic system or with economic growth?
> (2) Is it equitable?
> (3) Is it easily enforced and administered?
> (4) Does it yield merely negligible revenue?
> (5) Does it induce cost-push inflation?

Under his first heading—does it interfere with the efficient functioning of the economic system or with economic growth?—Professor Due asks some sub-questions: First he asks whether it distorts consumption patterns without a good reason. The foregoing discussion indicated a strong likelihood that the *droit de suite* would distort the consumption patterns of art works by removing a disproportionate number of potential buyers from the art market. Whether this is done for a "good reason" is an equitable question which economics cannot answer. However, the *droit de suite* would seem to pass the other tests which Due utilizes as subquestions. The *droit* would presumably not distort the choice of methods of production or organization of the business activity. Nor would it reduce capital formation, reduce aggregate consumer spending, or alter the relative choices of work and leisure.

The second question asked by Professor Due is whether the tax is equitable. This ordinarily means whether it is keyed to the ability to pay measured by income as well as wealth. It would seem that the *droit de suite* is "equitable" by this standard. It is imposed upon buyers of art at a relatively high price who presumptively have the ability to pay. The tax seems inequitable, however, on the theory that nobody reimburses the buyer who takes a loss on the picture yet must still pay the *droit*. Proponents of the *droit* belittle this argument by analogizing to other cases of copyright in which a royalty is payable whether the transaction was economically beneficial to the payor or not. The same thing is true of any excise tax. However, the writer still finds the inequity somewhat persuasive since the *droit* is permised on the notion that the artwork is appreciating while the artist is precluded from capitalizing on such appreciation. If the work is depreciating, this rationale seems less than compelling. And a number of our questionnaires reflected the same concern on the part of dealers.

Professor Due's third question is whether the tax can be easily enforced and administered. It seems obvious that the *droit de suite* is a tax which is most difficult to enforce and administer and will call for a substantial outlay of funds to keep track of the many sales of art, collect the money, distribute it to many artists (who may be hard to locate), and to maintain some sort of an audit or enforcement check on the honesty of persons who are reporting sales. It is thus unlike some other excise taxes, such as the cigarette tax, which is paid by a few manufacturers on an easily ascertained tax base. This criticism is greatly magnified if the *droit de suite* is based on a "plus value"—then the administration becomes almost prohibitively difficult. Nor can we disregard the complaints of dealers that a *droit de suite* would impose a highly unwelcome burden of record-keeping on them.

Fourthly, Due asks whether it would yield merely negligible revenue. His point of reference was some of the federal excise taxes which were far more of a nuisance than a revenue producer. We have little idea how much revenue the *droit de suite* would yield. In France, in 1966, for example, the amount collected was roughly $100,000. Although this would amount to substantial sums for many of the artists who were entitled to it, the amount is negligible in the sense in which Due uses it, even if the amount collected in the U.S. were several times as great.

Lastly, Due asks whether it would induce cost-push inflation. In view of the minor importance of the art market to the economy generally, the *droit de suite* would have little or no effect on whether there were general inflation.

Some economists feel that excise taxes play their most appropriate role when they are "sumptuary," i.e., on commodities such as liquor the consumption of which the government wishes to discourage, or on "luxuries." As my colleague Price argues, Government should in a variety of ways *encourage* the purchase of art, not the contrary. Therefore the sumptuary or luxury rationales are inapposite.

Another factor considered relevant to whether a tax is "good" is whether the tax is well accepted by the market place. A badly accepted tax meets constant overt and covert resistance. Resources are squandered in trying to avoid it and persons liable to tax decline to make voluntary disclosure of taxable transactions. Unfortunately, the *droit de suite* appears to invariably forment such insurrections. All of the questionnaires which were returned to us indicated a violent opposition on the part of art dealers to the *droit de suite*. Of course, this extreme aversion to the *droit* has been the usual pattern. The opposition of the Italian dealers to the bill has brought the Italian program to a grinding halt. The Government evidently feels no need to set it in motion again and the artists lack the necessary bargaining power to do so. Similarly in France, the enactment of the *droit* in 1920 caused a severe political battle and although Parliament in 1958 expanded the French droit to include sales by dealers, the opposition of this group has prevented the promulgation of the necessary regulations to implement the statutory change.

Although the art market perhaps tends to hyperbole in its resistance to new forms of Government intervention in the art market (which seems odd in view of its receptiveness to artistic innovation), the fact remains that this violent opposition exists and is nearly unanimous among the art world power structure (apart from the artists). This opposition cannot be ignored in appraising the feasibility of adopting the *droit*, since its adoption and administration would be accompanied by further wasteful resistance.

Thus the *droit de suite* on balance seems to be a "bad" tax in the economic sense. It interferes seriously with the market, produces negligible revenue, is costly to administer, and is poorly accepted by the market. . . .

From the point of view of micro-economics (subject, of course, to the caveat that we are dealing in suppositions with respect to the demand curve), *droit de suite* cannot be recommended. This is not to say, of course, that it should be rejected—the equitable rationale for the *droit* may override the economic objections. But the equitable case must be presented strongly indeed.

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NOTES AND QUESTIONS

1. As Weil and Asimow explain, statutory proceeds rights discourage the flow of money into the primary art market. The money available to buy the work of living artists is thus reduced. If the primary market is what most artists really care about, then they should seek to *increase* the money available for first purchases of art.

2. Do you understand Weil's suggestion that the statutory proceeds right regressively redistributes wealth? The idea is that it gives additional income to successful artists (i.e. those whose work increases in value) but that the money has to come from somewhere. Assuming that the total pot of art investment money is not decreased by the statutory proceeds right (probably an unduly optimistic assumption, see preceding question), its effect is to allocate a larger share of that pot to successful artists. This leaves less for the unsuccessful artists.

Camp Survey

EUROPEAN PRECEDENTS FOR THE PROCEEDS RIGHT

SELECTED EUROPEAN STATUTES AND CONVENTIONS

FRANCE. Law of March 11, 1957, no. 296.

Article 42. Authors of graphic and plastic works shall have, regardless of transfer of the original work, an inalienable right to participate in the proceeds of any sale of their works by public auction or through a dealer.

After the author's death, this *droit de suite* shall subsist to the benefit of the heirs and, for the usufruct provided by Article 24, to the benefit of the spouse, but excluding all legatees and transferees, for the current calendar year and fifty years thereafter.

The rate of the levy for this right shall be uniformly fixed at 3 per cent, applicable only on a sales price of more than 10,000 francs.

The levy shall be based on the sales price of each work and on the total sales price, without any deduction.

Ministerial regulations shall determine the conditions under which the authors shall assert their claims to the right recognized by the provisions of the present Article, in the case of the sales referred to in the 1st paragraph.

GERMANY. LAW OF 16 SEPTEMBER 1965 NO. 51.

(AUTHORS' NOTE: In 1973 this statute was amended to increase the artist's share to 5% and to decrease the minimum sale price to 100 DM.)

Article 26, Droit de Suite — (1) Should the original of an artistic work be resold and should such resale involve an art dealer or an auctioneer as purchaser, vendor or agent, the vendor shall pay the author a participation at the rate of one per centum of the sale price. There shall be no such obligation if the sale price is less than five hundred German marks.

(2) The author may not in advance waive his right to the participation. The expectancy thereof shall not be subject to judicial execution; any disposition of the expectancy shall be without legal effect.

ITALY. LAW OF 22 APRIL 1941, NO. 633.

RIGHTS OF THE AUTHOR IN RESPECT OF INCREASE IN VALUE OF WORKS OF ART

ARTICLE 144

The authors of works of art in the form of paintings, sculptures, drawings and prints shall be entitled to a percentage of the amount by which the price of the first public sale of original copies of such works exceeds the price of first alienation, and such excess shall be presumed.

The organizer of the sale, the vendor and the purchaser shall, however, be entitled to prove that such public sale was not preceded by any act of alienation for valuable consideration, or that the price of first alienation was not less than that obtained in the public sale.

ARTICLE 145

The authors of the works indicated in the preceding Article shall also be entitled to a precentage of the higher value that the original copies of their works ultimately acquire in successive public sales, such higher value being the difference between the price at the last public sale and the price at the public sale which immediately preceded it.

ARTICLE 146

The percentages specified in the preceding Articles shall be due only if the selling price is in excess of 1,000 lire in the case of drawings and prints, 5,000 lire in the case of paintings, and 10,000 lire in the case of sculptures. The percentages shall be payable by the owner selling the work.

ARTICLE 147

If the price of the original copy of the works specified in this Section, at any sale which is not deemed to be public under law, attains 4,000 lire in the case of drawings and prints, 30,000 lire in the case of paintings, and 40,000 lire in the case of sculptures, and also exceeds five times the price of first alienation, however effected, such increase in value shall be subject to a payment of 10% to the authors of the works, payable by the owner selling them.

Proof of the price paid for a work and of the conditions specified in this Article shall be the responsibility of the authors.

The percentage shall be reduced to 5% if the vendor proves, in turn, that he acquired the copy at a price not less than half of that realized by him.

The provisions of Article 145 shall apply for the purpose of determining the higher value.

ARTICLE 148

For the purposes of the protection specified in the foregoing Articles, replicas made by the author shall also be considered as original works, but not reproductions otherwise produced. In respect of prints, those which have been derived from original engravings, signed by the author, shall be considered as original works.

ARTICLE 149

For the purposes of this Law, the following shall be considered public sales:

(a) sales effected at shows and exhibitions, authorized within the meaning of Royal Decree Law of January 21, 1934, No. 454, which became the Law of July 5, 1934, No. 1607;

(b) sales by court order;

(c) sales effected by means of public auctions;

(d) sales of works offered for sale at public auctions, but withdrawn from such offering as the result of private negotiations;

(e) sales effected in connection with private exhibitions organized or carried out by third parties.

ARTICLE 150

The rights specified in Articles 144, 145, 146 and 147 shall belong to the author and, after his death, and in the absence of testamentary provisions, to his spouse and legitimate heirs to the third degree, according to the rules of the Civil Code; if there are no successors as above indicated, the rights shall devolve upon the insurance and assistance fund of the National Syndicate of Fine Arts (*Casa di previdenza e di assistenza del Sindicato nazionale della belle arti*).

Such rights shall continue for the life of the author and fifty years after his death, and may not be the object of alienation or advance renunciation.

ARTICLE 151

The percentage due upon the price of the first public sale within the meaning of Article 144 shall be fixed at the level of 1% for amounts up to 50,000 lire; 2% for amounts exceeding that sum and up to 100,000 lire; and 5% for any further excess.

ARTICLE 152

The percentages due upon the increase in value determined in accordance with Article 145 shall be fixed as follows:

2% for increases in value not exceeding 10,000 lire
3% for increases in value in excess of 10,000 lire
4% for increases in value in excess of 30,000 lire
5% for increases in value in excess of 50,000 lire
6% for increases in value in excess of 75,000 lire
7% for increases in value in excess of 100,000 lire
8% for increases in value in excess of 125,000 lire
9% for increases in value in excess of 150,000 lire
10% for increases in value in excess of 175,000 lire

ARTICLE 153

The person who legally presides over the public sale of works of art referred to in this Section shall be obliged to deduct from the sale price of original copies the percentages due within the meaning of Articles 144 and 145, and to pay such amount to the "E.I.D.A." under the conditions specified in the Regulations.

Until such time as the payment is effected, the person who presides at the sale shall, for the purposes of law, be deemed to be the depository of the sums deducted.

ARTICLE 154

Works of art which, in a public sale, have attained at least the price indicated in Article 146, shall be notified to the "E.I.D.A." by the person who has lawfully directed the sale. Such person shall proceed to effect appropriate registration in the manner prescribed by the Regulations.

In the absence of any imputation of falsity, the registration effected shall constitute proof of the price obtained for the work.

Berne Copyright Union (1886) as modified in Paris Act (1971) art. 14ter.

(1) The author, or after his death the persons or institutions authorized by national legislation, shall, with respect to original works of art and original manuscripts of writers and composers, enjoy the inalienable right to an interest in any sale of the work subsequent to the first transfer by the author of the work.

(2) The protection provided by the preceding paragraph may be claimed in a country of the Union only if legislation in the country to which the author belongs so permits, and to the extent permitted by the country where this protection is claimed.

(3) The procedure for collection and the amounts shall be matters for determination by national legislation.

Paul Sherman

Incorporation of the *Droit de Suite* into United States COPYRIGHT LAW 18 COPYRIGHT LAW SYMPOSIUM 50, 54 (1968)

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OTHER COUNTRIES

The *droit de suite* has seen a slow advance in acceptance by other states. Belgium was the first to follow the French lead in 1921. A Czechoslovak statute followed in 1926, and a Polish one in 1935. Uruguay instituted the right in 1937; . . .

In Czechoslovakia, the art proceeds right operated only upon the increase in value of the latest sales price over the preceding sales price. The amount of the award was to be determined by the courts, with the maximum rate set at 20 percent. A number of factors were to be considered, including the relative financial status of the artist and the vendor. The law had very little actual application; it has since been modified to apply only where a "socially unjustified" profit has been realized.

The Polish statute also imposed a charge only upon the added value in later sales. The vendor was required to pay the artist 20 percent of this sum, if it amounted to at least 50 percent of the acquisition price. The law was omitted in the 1952 recodification. In Uruguay, the percentage to be collected under the *droit de suite* amounts to 25 percent of the added value. This statute applies not only to artists but to all authors; it, too, has proved unsuccessful. . . .

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NOTES AND QUESTIONS

1. Which of the three statutory systems would appear to be most difficult to apply in practice?

2. For a thorough examination of the *droit de suite* in Italy see DeSanctis and Fabiani, "The Right on the Increase in Value of the Works of Fine Arts in the Italian Copyright Law," in *Legal Rights of the Artist* (M. Nimmer ed. 1971). DeSanctis and Fabiani state that as early as 1950, the application of the Italian *droit de suite* legislation "came to a standstill."

3. The French were the first to establish the *droit de suite* in 1920. As originally enforced it applied only to sales at auction. The extension to sales by dealers was part of a major revision of the law applicable to artists' rights in 1957. However, the statute requires implementing rules, and these have not been issued. The executive, which opposes extension, refuses to issue the rules and would like the reference to sales by merchants to be repealed. But the legislature, which favors extension, will not repeal. As a result, the French statute still is applied, in practice, only to sales at auction. The German

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statute purports to cover both kinds of sales. As to sales by merchants, however, it is clear that enforcement depends almost entirely on the good will and voluntary compliance of art dealers, and these are likely to become rarer with the 1973 increase in coverage and higher percentage (DM 100; 5%). None of the three statutes purports to apply to private sales.

4. Suppose a painting at auction fails to reach the reserve price. Is the artist entitled to his cut? It seems to have been decided in Italy (by scholars) that the right applies only to true sales, but an important French decision, dealing with a work by the Douanier Rousseau, takes a different direction. There the painting by Rousseau was bid in for the owner. The heirs of Rousseau demanded their percentage of the last bid. The court (Tribunal de la Seine, 21 Jan. 1931, Gaz. du Palais 1931. I. 301) held that they were entitled to payment. The decision, which was in part based on the court's view that the use of the secret reserve was illicit, is criticised in Wahl, "Le Droit des Artistes sur les Oeuvres Retirées d'une Vente Publique ou Adjugées au Profit du Vendeur," 1936 Rev. trim. dr. civ. 613.

5. The Italian legislation entitles the artist to a percentage of the excess of the sale price above that of the previous sale of the work. We may think this is more equitable than the French scheme if we think it unfair to charge the seller even when he makes no profit or suffers a loss upon sale. Under the Italian approach, should the artist have to contribute if the painting were sold at an loss?

6. The French, German, and Italian statutes and the Berne Convention all make the *droit de suite* inalienable. What is the rationale for this provision?

7. How is the French *droit de suite* actually collected? In this connection, consider the following excerpts from Hauser, "The French Droit de Suite: The Problem of Protection for the Underprivileged Artist under the Copyright Law," 11 Copyright L. Sym. 1, 8 (1959):

(This material was originally copyrighted and published in *11 Copyright Law Symposium*, 1, 8, (1959) and is reprinted herewith by permission of the American Society of Composers, Authors and Publishers.)

> How, then, does the artist vindicate his rights? The ministerial decree of December 17, 1920 enumerates the formal procedure, which, briefly stated, requires the artist to insert in the *Journal Officiel* a special declaration to the effect that he claims the *droit de suite* in a given artistic work. He indicates his name, address, *artistic* signature, and legal signature, indicating that the procedure was as much conceived as a means of authenticating works of art, as a requisite step in manifesting the artist's intent to benefit from the *droit de suite*.
>
> A duplicate of this declaration is filed with the Minister of Fine Arts. The declaration may be made by the artist at any time, or by his heirs

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or assigns, and, what is of fundamental practical importance, article 3 of the decree permits the making of the declaration and the receipt of the sums due by any designated agent of the artist. Both Ferry and later Berard, in the parliamentary debates, make plain that the virtual functioning of the *droit de suite* presupposes an association of artists which will protect the interests of its members, much as ASCAP operates in the United States. Several groupings of artists and authors in France have fought over the years for supremacy, an interesting study in itself; it was, finally, the Union of Artistic Property which prevailed and which is now the sole organ of collection of the *droit de suite*. *It is amazing to note that no instances can be found,*) [illegible] according to the Secretary General of the Union, in which an individual artist or his heirs have attempted to collect directly from the public officer.

As a result of this monopoly, various deviations from the letter of the law have occurred, since the procedure of the Union is the real determinant of the operation of the *droit de suite* in France. The public auction officers, responsible for collecting the *droit de suite* and turning the sums over to the artist within three months, are obliged to keep a special register noting sales had and prices received. The Union has made arrangements to use this register and the auctioneer's catalog which, coupled with the information found in trade papers, provides a complete basis for supervising the collection of sums due. The Union sends a printed statement to the public officer who then indicates on it the price had at auction and the amount thus due under the *droit de suite*. He returns it, plus the sums due, to the Union and by this informal procedure he obviates his legal responsibility, stipulated in the 1920 decree, to see that the sums are turned over to the artist or his heirs. The Union takes over this job; the officer is left with only the duty of collecting the sums from the seller. Thus, all the stipulations of the decree concerning possible objection to payment by the seller or refusal by the officer to turn the sums over to the alleged artist are avoided in practice. It is the Union alone that will sue or be sued in connection with the enforcement of the *droit de suite*, save, of course, where the officer neglects or refuses to assess the *droit de suite*.

Today, most French artists belong to the Union, and if one is found who does not, his adherence is immediately solicited. Formal declarations are, therefore, no longer made, with the result that the authenticity aspect of the decreed procedure has been totally lost. . . .

It seems fairly clear, then, that the practical supervision and operation of collection under the *droit de suite* has been successful until now. . . .

THE CALIFORNIA STATUTE

The people of the State of California do enact as follows:

SECTION 1. Section 986 is added to the Civil Code, to read:

986. (a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or his agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.

(1) When a work of art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as the agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

(2) If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

(3) If a seller or his agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer.

(4) Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

(5) The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the operating fund of the council as reimbursement to fund programs of the council.

(6) Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from attachment or execution of judgment by the creditors of such seller or agent.

(b) Subdivision (a) shall not apply to any of the following:

(1) To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

(2) To the resale of a work of fine art for a gross sales price of less than one thousand dollars ($1,000).

(3) To a resale after the death of such artist.

(4) To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

(5) To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars ($1,000).

(c) For purposes of this section, the following terms have the following meanings:

(1) "Artist" means the person who creates a work of fine art.

(2) "Fine art" means an original painting, sculpture, or drawing.

(d) This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e) If any provision of this section or the application thereof to any person or circumstance is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.

SEC. 2. The rights of an artist of a work of fine art to receive payment of an amount equal to 5 percent of the amount of a sale of fine art within the provisions of Section 986 shall be vested at the time of such sale; except that an artist shall have no rights to any payment pursuant to this act, if any provision therein is subsequently repealed so as to remove the provisions for such payment, as to any sale which occurs subsequent to such repeal; and except that, in the event of any provision in this act is otherwise subsequently amended or changed, an artist shall have only those rights to payment provided for by such subsequent amendment or change and shall have no rights to any payment pursuant to this act, as to any sale which occurs subsequent to such amendment or change.

■

NOTES AND QUESTIONS

1. Observe that the California statute gives the artist a right to 5% of the resale price, not a share in the profits. In the advocacy for a proceeds right

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law many have proposed that the artist be given a share of the profits (the figure 15% was commonly advanced). Which is the preferable approach? Why?

2. Suppose C, a California resident travelling in Paris, buys a drawing by Chagall for $15,000. He then visits Zurich and sells the drawing there for $16,000. Under the California statute, does C owe Chagal anything? If so, how much?

3. Suppose Collector, who resides in California, buys a painting by Roy Lichtenstein in 1965 for $15,000. In 1977 he places it at auction in New York and the high bid is $20,000. Collector paid $1,000 to pack, ship and insure the painting to New York. The auctioneer takes $3,000 commission on the sale. Due to inflation, $20,000 is equivalent to $13,000 in 1965 terms. If Collector had put the $15,000 in a savings and loan account in 1965 it would by 1977 have grown to approximately $40,000. Under the California statute, how much, if anything, does Collector owe Mr. Lichtenstein?

4. Observe that the California statute applies to private sales and to gallery sales as well as to auction. Is this extension workable? One reason why the European statutes do not attempt to include private sales is the practical difficulty of enforcement (or ease of evasion). Is it good policy to enact laws that are unenforcible and invite evasion?

5. The California statute does not apply to the resale of fine prints. Should it do so?

6. One of the objections made to the California statute is that the proceeds right is an aspect of copyright reserved by the U.S. Constitution and the 1909 and 1976 Copyright Acts to the federal government. This preemption argument is central to an action brought in California in 1977 challenging the California statute's constitutionality. Other arguments raised in that action are: (1) that the statute impermissably burdens sales in interstate commerce; (2) that the statute (which applies to works acquired before it was enacted) retroactively divests vested constitutional rights, thus impairing the obligation of contracts and depriving the owner of property without due process of law; (3) that in attempting to include transactions that occur outside California and that do not involve California artists the statute's excessive jurisdictional reach violates the due process clause. At this writing no decision has been announced. *Morseburg v. Balyon and California Arts Council*, Civil Action No. 77 2410 RMT (U.S. Dist. Ct., Central Dist. Calif.).

THE CONTRACTURAL PROCEEDS RIGHT

AUTHORS' NOTE: One of the arguments occasionally made by some opponents of proceeds rights laws is that they are unnecessary; the artist can, if he wishes, contract for such a right when he initially sells the work, and his desire to retain a proceeds right becomes one element in a bargaining process

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that affects the price paid for it. In most states, where there is no statutory proceeds right, the contract is the only available means for the artist who is convinced that he should have such a right. Several contract forms of this kind have been prepared and publicised.

A major difficulty with contract provisions is that there is no way to make them legally binding on subsequent owners of the work of art. The artist can, by contract, bind only the person with whom he directly deals. Suppose Artist sells to Collector, Collector then sells to *X*, and *X* then sells to *Y*. Artist can rely on a contract provision to recover from Collector for the Collector-*X* transaction. But unless there is a separate agreement by *X* to pay Artist a percentage of *X*'s resale price, Artist will have no recourse against *X* for the *X*-*Y* transaction or against subsequent parties for later transactions. Artist can extract a promise from Collector to include a proceeds right clause in favor of Artist in any resale contract, but suppose *X* refuses to accept such a provision or Collector neglects to require it. If the Collector-*X* sales goes ahead, *X* takes the painting free of any legal obligation to Artist.

One reason for this state of the law is concern for third persons who take without notice of restrictions—called "bona fide purchasers." Another concern is with the free and unrestricted movement of goods in commerce. These concerns combine to make it unlikely that any attempt to make a contractual provision—a proceeds right or any other—legally effective against "remote" parties—i.e. against persons who are not parties to the transaction—will work.

In the case of land it is possible to make agreements that *will* bind remote parties—so-called "covenants running with the land." The system of covenants running with land at law and equity relies for its effectiveness on the existence of a real property recording system, on the legal concept of "record notice," and on the fact that most such servitudes are apparent to one who makes a reasonable inspection of the premises. There is no comparable system of records of art transactions and no equivalent of record notice of restrictions like proceeds right provisions. The Projansky and Kienholz agreements *(infra)* provide for notice of the artist's reserve to be attached to the work. Kienholz is a sculptor, and it seems possible that such notice might be given without marring his work. But it is not clear how such notice could be permanently and indelibly attached to paintings and drawings in such a way as to be both apparent to subsequent acquirers and yet so unobtrusive as to leave the work itself unimpaired. In this connection, recall the refusal of some artists to place copyright notices on their works because they believe the image would be impaired.

Thus the contract is a relatively ineffective way of giving the artist continuing rights in the work. If one wishes to argue against the statutory proceeds right on the ground that the artist can assure the right by contract, then it is obvious that such an argument is only partially valid. The artist can

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contract effectively for a proceeds right in the first resale, but not, under present law, in subsequent transactions.

A workable system of records and of notice to remote parties would be extremely difficult to devise and expensive to establish and maintain but might be possible—perhaps through the Register of Copyrights in Washington—if it were thought important enough to have one. The French attempted something of the sort in their 1920 legislation but eventually gave it up.

These considerations should be kept in mind in reading the following contracts and the claims made for them by their authors.

◆

THE SIEGELAUB-PROJANSKY CONTRACT

Robert Projansky

The Rights of Artists

Juris Doctor, June 1974, p. 16

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In 1971, in conjunction with then art dealer and consultant Seth Siegelaub—who is one of the principal forces responsible for the advent of conceptual art—I drafted a form contract called "The Artist's Reserved Rights Transfer and Sale Agreement." Published and distributed to artists in the United States and Europe (where it has been translated into French, German, Italian, Dutch, Swedish), the form provides, among other things, that if a piece is resold the artist receives 15 percent of the gross profit. This is similar to the *droit de suite*, a statutory right in France, Italy, Germany, and other countries giving artists or their heirs a small percentage of the purchase monies for works sold at public auction. (Legislative *droit de suite* varies from country to country. A flat fee may be payable on public resale, or a percentage may be paid only on sales where a painting has increased in value.)

In addition, our form provides that the covenant runs with the

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work of art (pursuant to a notice affixed to the piece where it wouldn't ordinarily be seen, but where it can be found), and that the owner is not to change or destroy the work, a right that is available to an artist in this country only by contract.

Other rights reserved to the artist are the sole rights to reproduce, the right to restore the work if damaged, the right to have and show the work for 60 days out of every five years and the right to be notified of the details of any exhibition. A few years ago a sculptor named Takis made an enormous scene by more or less "arresting" one of his sculptures at the Whitney Museum in New York because he was enraged at the circumstances of its display. It was his, he said, because he created it, but of course the trustees of the museum considered it theirs.

Our contract has been called "very creative" and "cleverly drafted" by legal commentators, but a more satisfying response has been its use, not only by some very successful artists who command large prices, but also by those who sell no work but use it when they trade a piece to settle the dentist's bill. The contract is particularly attractive to the artist because it gives him the kind of advantage that Hertz and Avis have: the man behind the counter didn't draft the leasing contract, but it has in it all the protections the lessor wants. If you want the car, you sign the contract.

I recently decided that my supposed cleverness notwithstanding, the contract was so carefully drawn—to maintain a chain of privity, for example—that only a lawyer could appreciate it (or, some have said, even read it). So I have written a second edition, soon to be published and, I hope, distributed throughout the country. Amazingly, I found that it was possible to reduce the gross wordage by about 60 percent and still say the same things just as effectively—and make the contract itself more effective in terms of the artist getting people to sign it. Now few buyers will feel the need to show it to counsel first.

SETH SIEGELAUB

THE ARTIST'S RESERVED RIGHTS TRANSFER AND SALE AGREEMENT

(Distributed to Artists by the School of Visual Arts in New York) (February 1971).

The accompanying 3 page Agreement form has been drafted by Bob Projansky, a New York lawyer, after my extensive discussions and

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correspondence with over 500 artists, dealers, lawyers, collectors, museum people, critics and other concerned people involved in the day-to-day workings of the international art world.

The Agreement has been designed to remedy some generally acknowledged inequities in the art world, particularly artists' lack of control over the use of their work and participation in its economics after they no longer own it.

The Agreement form has been written with special awareness of the current ordinary practices and economic realities of the art world, particularly its private cash and informal nature, with careful regard for the interests and motives of all concerned.

It is expected to be the standard form for the transfer and sale of all contemporary art, and has been made as fair, simple and useful as possible. It can be used either as presented here or slightly altered to fit your specific situation.

If the following information does not answer all your questions consult your attorney.

WHAT THE AGREEMENT DOES

The Agreement is designed to give the artist:

- 15% of any increase in the value of each work each time it is transferred in the future.
- a record of who owns each work at any given time.
- the right to be notified when the work is to be exhibited, so the artist can advise upon or (see Article Seven (b)) veto the proposed exhibition of his/her work.
- the right to borrow the work for exhibition for 2 months every five (5) years (at no cost to the owner).
- the right to be consulted if repairs become necessary.
- half of any rental income paid to the owner for the use of the work at exhibitions, if there ever is any.
- all reproduction rights in the work.

The economic benefits would accrue to the artist for life, plus the life of a surviving spouse (if any) plus 21 years, so as to benefit the artist's children while they are growing up. The artist would maintain aesthetic control only for his/her lifetime.

Although the contract may seem to alter the previous relationship between artist and art owner principally by putting new obligations on the owners, the Agreement really does some very good things for the

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collector. In return for these obligations, which are almost costless for the collector, he gets substantial benefits; the Agreement is designed:

- to give each owner the formalized right to receive from the artist (or his/her agent) a certified history and *provenance* of the work.
- to create and clarify a non-exploitative, one-to-one relationship between the artist and the owner.
- to maintain this relationship—what lawyers call "privity"—between the artist and each successive owner of the work.
- to establish recognition that the artist maintains a moral relationship to the work, even as the collector owns and controls it.
- to give assurance to the owner that he is using the work in harmony with the artist's intentions.

WHEN TO USE THE AGREEMENT

The Agreement form has been designed to be used by the artist at the time of the FIRST TRANSFER—either by gift, or barter for things or services, or sale

of EACH INDIVIDUAL work of art—

> either a painting, a sculpture, a drawing, a graphic, a multiple, a mural, an immovable sculpture, a non-object work, or any other fine art you can think of

from the artist to ANYONE else—

> either a friend, another artist, collector, museum, gynecologist, lawyer, corporation, landlord, relative or dealer.

IMPORTANT: it is NOT for use when you lend your work to exhibitions or when you give it to your dealer on consignment. It IS for use when the dealer sells your consigned work.

In short, the Agreement form is to be used when you part with your work for keeps.

Its terms are effective and it requires a very simple procedure to keep it in effect with each successive owner of your work of art.

It requires the artist and the first owner of the work to fill out and sign the Agreement form and also, to affix a notice of the existence of the Agreement somewhere on the work of art itself.

THE FACTS OF LIFE: YOU, THE ART WORLD AND THE AGREEMENT

The general response to the preliminary draft of this Agreement form has been extremely favorable; the vast majority of people in the art world feel it is fair, reasonable and practical. A few have expressed certain reservations about whether or not people will actually use it. These reservations can be summed up in two basic statements:

- ". . . the economics of buying and selling art is so fragile that if you place one more burden on the collectors of art, they will simply stop buying art . . .," and
- ". . . I will certainly use the Agreement—if everyone else uses it . . ."

The first statement is nonsense; clearly the art will be just as desirable with as without the Agreement and there is no reason why the value of any art should be affected at all, especially if this contract is standard practice in the art world—which brings us to the second statement. If there is a problem here, this statement reflects it: it is the concern of the individual artist or dealer that the insistence on the use of the contract will jeopardize their sales in a competitive market.

If we examine this notion carefully, we see it doesn't hold up.

ALL artists sell, trade and give their work to only two kinds of people:

- those who are their friends.
- those who are not their friends.

Obviously, your friends will not give you a hard time; they will sign the Agreement with you. The ONLY trouble will come when you are selling to someone who is not a friend. Since surely 75% of all art that is sold is bought by people who are friends of the artist or dealer—friends who dine together, see each other socially, drink together, weekend together, etc.—whatever resistance may appear will come only in respect to some portion of the 25% of your work that is being sold to strangers. Of these people, most will wish to be on good terms with you and will be happy to enter into the Agreement with you. This leaves 5% of your sales which will encounter serious resistance over the contract. Even this real resistance should decrease toward zero as the contract comes into widespread use.

In a manner of speaking, this Agreement will help you discover who your friends are.

If a collector wants to buy but doesn't want to sign the Agreement, you should tell him that all your work is sold under the contract, that it is standard for your work.

If he buys work only from those few artists who won't insist on using the Agreement he is being very foolish; non-use of this Agreement is a very dumb criterion for building one's collection.

There are other things that you can point out to the reluctant collector:

- first of all, it's not going to cost him anything unless your work appreciates in value. If that doesn't cut any ice, and he wants to keep *all* of whatever profit he might make with your work, you can simply write in a higher value for it, thus giving him a free ride for the first part of the appreciation he anticipates.
- if and when he sells your work and he owes you some payment, he doesn't necessarily have to pay you with money; you can give him credit against the purchase of a new work or take payment in services or something other than money.
- of course, if a collector buys a work without the contract when the use of the Agreement has become the standard practice for the artist, the collector will have to rely on sheer good-will when he later wants the artist (or his/her dealer) to appraise, repair or authenticate it. Why he should expect to find any good-will there is anybody's guess.

Is the collector really going to pass up your work because you want him to sign the contract? Work that he likes and thinks is worth having? If the answer is yes, given the fact that it won't cost *him* anything to give you the respect that you as the creator of the work deserve—if that will keep him from buying, he is being very stubborn and foolish and nobody can tell you how to illuminate him.

Using the contract doesn't mean that all your relationships in the art world will hereafter be strictly business or that you will have to enforce your rights down to the last penny. Friends will still be friends; you will be able to waive your rights to payments (in whole or in part), your right to make repairs, to grant reproduction rights, to be consulted—but they will be YOUR rights and the choices will be YOURS.

The Agreement form has been prepared to be used by any and all artists—known, well-known and unknown. Simply make a lot of copies and use it whenever you give, trade or sell your work. It will be effective from the moment you use it. The more artists and dealers there are using it, the better and easier it will be for everybody. It requires no organization, no dues, no government agency, no meetings, no public registration, no nothing—just your will to use it. Just plug it in and watch it go—a perfect waffle every time!

ENFORCEMENT

First, let's put this question in perspective: most people will honor the Agreement because most people honor agreements. Those few people who will try to cheat you are likely to be the same kinds who will give you a hard time about signing the Agreement in the first place. Later owners will be more likely to try to cheat you than the first owner, with whom you or your dealer have had some face-to-face contact, but there are strong reasons why both first and future owners should fulfill the contract's terms.

What happens if owner #2 sells your work to owner #3 and doesn't send you the transfer form? (He's not sending your money, either.)

Nothing happens. (You don't know about it yet.)

Sooner or later you do find out about it because it takes a lot of effort to conceal such sales and the grapevine will get the news to you (or your dealer) anyway. To conceal the sale, owner #3 has to conceal the work and he's not going to hide a good and valuable work just to save a little money. And if he ever wants to sell it, repair it, appraise it or authenticate it, he MUST come to you (or your dealer). When you do find out about such a transfer—and you will— you sue owner #2, who will be stuck for 15% of the increase based on the price to owner #3 OR on the value at the time you find out about it, which may be much higher. Clearly, a seller (in this case owner #2) would be extremely foolish to take this chance, to risk having to pay a lot of money just to save a little money.

Bad law

As to falsifying values reported to the artist, there will be as much pressure from the new owner to put in a falsely high value as from the old owner to put in a low value. There are real difficulties inherent in getting two people to lie in unison, especially if it only benefits one of them—the seller. In 95% of the cases the amount of money to be paid to the artist won't be enough to compel the collectors to lie to you.

You will note that in the event you have to sue to enforce any of your rights under the Agreement, ARTICLE NINETEEN gives you the right to recover reasonable attorney's fees in addition to whatever else you may be entitled to.

SUMMATION

We realize that this Agreement is essentially unprecedented in the art world and that it just may cause a little rumbling and trembling; on the other hand, the ills it remedies are universally acknowledged to exist and no other practical way has ever been devised to cure them.

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Whether or not you, the artist, use it, is of course up to you: what we have given you is a legal tool which you can use yourself to establish ongoing rights when you transfer your work. This is a substitute for what has existed before—nothing.

We have done this for no recompense, for just the pleasure and challenge of the problem, feeling that should there ever be a question about artists' rights in reference to their art, the artist is more right than anyone else.

AGREEMENT OF ORIGINAL TRANSFER OF WORK OF ART

This agreement made this .... day of ...., 19..., by and between .... (hereinafter the "Artist"), residing at .... and .... (hereinafter the "Collector"), residing at ....;
WITNESSETH:
WHEREAS the Artist has created that certain work of art;
Title: .... Identification #: ....
Date: .... Material: ....
Dimensions: .... Description: ....
(hereinafter "the Work"); and
WHEREAS Artist is willing to sell the Work to Collector and Collector is willing to purchase the Work from Artist, subject to mutual obligations, covenants, and conditions herein; and
WHEREAS Collector and Artist recognize that the value of the Work, unlike that of an ordinary chattel, is and will be affected by each and every other work of art the Artist has created and will hereafter create; and WHEREAS the parties expect the value of the Work to increase hereafter; and
WHEREAS Collector and Artist recognize that it is fitting and proper that Artist participate in any appreciated value which may thus be created in the Work; and
WHEREAS the parties wish the integrity and clarity of the Artist's ideas and statements in the Work to be maintained and subject in part to the will or advice of the creator of the Work,
NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants hereinafter set forth and other valuable considerations the parties hereto agree as follows:
PURCHASE AND SALE. ARTICLE ONE: The Artist hereby sells

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to Collector and Collector hereby purchases the Work from Artist, subject to all the covenants herein set forth (for the price of ...., receipt of which is hereby acknowledged) (at the agreed valuation for the purposes of this agreement of . . .).

FUTURE TRANSFERS: ARTICLE TWO: Collector covenants that in the event Collector shall hereafter sell, give, grant, barter, exchange, assign, transfer, convey or alienate the Work in any manner whatsoever or if the Work shall pass by inheritance or bequest or by operation of law, or if the Work shall be destroyed and insurance proceeds paid therefor, Collector or Collector 's personal representative shall:

(a) file a current TRANSFER AGREEMENT AND RECORD in the form and containing the information set forth and called for in the specimen hereunto annexed and made a part hereof, completed and dated, and subscribed by Collector or Collector's personal representative and collector's transferee, with the (Artist at the address set forth above) (Artist's agent for the purpose: at: ....) within thirty days of such transfer, distribution, or payment of insurance proceeds, and shall

(b) pay a sum equal to fifteen percent (15%) of the Appreciated Value (as hereinafter defined), if any, occasioned by such transfer or distribution or payment of insurance proceeds to (Artist at the address set forth above) (Artist's agent for the purpose: .... at: .) within thirty days of such transfer, distribution, or payment of insurance proceeds.

PRICE/VALUE. ARTICLE THREE: The "price or value" to be entered on a TRANSFER AGREEMENT AND RECORD shall be:

(a) the actual selling price if the Work is sold for money; or

(b) the money value of the consideration if the Work is bartered or exchanged for a valuable consideration; or

(c) the fair market value of the Work if it is transferred in any other manner.

APPRECIATED VALUE. ARTICLE FOUR: "Appreciated Value" of the Work for the purposes of this Agreement, shall be the increase, if any, in the value or price of the Work set forth in a current duly executed and filed TRANSFER AGREEMENT AND RECORD over the price or value set forth in the last prior duly executed and filed TRANSFER AGREEMENT AND RECORD, or, if there be no prior duly executed and filed TRANSFER AGREEMENT AND RECORD, over the price or value set forth in ARTICLE ONE herein

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(a) In the event a current duly executed TRANSFER AGREEMENT AND RECORD is not timely filed as required by ARTICLE TWO herein, Appreciated Value shall nonetheless be computed as if such current TRANSFER AGREEMENT AND RECORD had been duly executed and filed, with a price or value set forth therein equal to the actual market value of the Work at the time of the current transfer or at the time of the discovery of such transfer.

TRANSFEREES TO RATIFY AGREEMENT. ARTICLE FIVE: Collector hereby covenants that he will not hereafter sell, give, grant, barter, exchange, assign, transfer, convey or alienate the Work in any manner whatsoever or permit the Work to pass by inheritance or bequest or by operation of law to any person without procuring such transferee's ratification and affirmation of all the terms of this Agreement and transferee's agreement to be bound hereby and to perform and fulfill all of the Collector's covenants set forth herein, said ratification, affirmation and agreement to be evidenced by such transferee's subscription of a current duly completed and filed TRANSFER AGREEMENT AND RECORD.

PROVENANCE. ARTICLE SIX: Artist hereby covenants that (Artist) (Artist's agent for the purpose as set forth in ARTICLE TWO) will maintain a file and record of each and every transfer of the Work for which a TRANSFER AGREEMENT AND RECORD has been duly filed pursuant to ARTICLE TWO herein and will at the request of the Collector or Collector's successors in interest, as that interest shall appear, furnish in writing a provenance and history of the Work based upon said records and upon Collectors' notices of proposed public exhibitions and will certify in writing said provenance and history and the authenticity of the Work to Collector and his successors in interest, and, at Collector's reasonable request, to critics and scholars. Said records shall be the sole property of the Artist.

EXHIBITION. ARTICLE SEVEN: Artist and Collector mutually covenant that

(a) Collector shall give Artist written notice of Collector's intention to cause or permit the Work to be exhibited to the public, advising Artist of all details of such proposed exhibition which shall have been made known to Collector by the exhibitor. Said notice shall be given for each such exhibition prior to any communication to the exhibitor or the public of Collector's intention to cause or permit the Work to be exhibited to the public. Artist shall forthwith com-

BEST AVAILABLE COPY

municate to Collector and the exhibitor any and all advice or requests that he may have regarding the proposed exhibition of the Work. Collector shall not cause or permit the Work to be exhibited to the public except upon compliance with the terms of this article.

(b) Collector shall not cause or permit any public exhibition of the Work except with the consent of the Artist to each such exhibition.

(c) Artist's failure timely to respond to Collector's timely notice shall be deemed a waiver of Artist's rights under this article, in respect to such exhibition and shall operate as a consent to such exhibition and to all details thereof of which Artist shall have been given timely notice.

ARTIST'S POSSESSION. ARTICLE EIGHT: Artist and Collector mutually covenant that Artist shall have the right, upon written notice and demand to Collector made not later than 120 days prior to the proposed shipping date therefor, to possession of the Work for a period not to exceed sixty (60) days solely for the purpose of exhibition of the Work to the public at and by a public or non-profit institution, at no expense whatsoever to Collector. Collector shall have the right to satisfactory proof of sufficient insurance and pre-paid transportation or satisfactory proof of financial responsibility therefor. Artist shall have the right to such possession of the Work for one period not to exceed sixty (60) days every five (5) years.

NON-DESTRUCTION. ARTICLE NINE: Collector covenants that Collector will not intentionally destroy, damage, alter, modify or change the Work in any way whatsoever.

REPAIRS. ARTICLE TEN: Collector covenants that in the event of any damage to the Work, Collector shall consult with Artist prior to the commencement of any repairs or restoration and if practicable Artist shall be given the opportunity to make any required repairs or restoration.

RENTS. ARTICLE ELEVEN: In the event that Collector shall become entitled to any monies as rent or other compensation for the use of the Work at public exhibition, the Collector shall pay a sum equal to one-half of said monies to (Artist) (Artist's agent as set forth in ARTICLE TWO herein) within thirty (30) days of the date when Collector shall become entitled to such monies.

REPRODUCTION. ARTICLE TWELVE: Artist hereby reserves all rights whatsoever to copy or reproduce the Work. Artist shall not unreasonably refuse permission to reproduce the Work in catalogues and the like incidental to public exhibition of the Work.

NON-ASSIGNABILITY. ARTICLE THIRTEEN: No rights created in the Artist and for the Artist's benefit by the terms of this Agreement shall be assignable by Artist during the Artist's lifetime, except that nothing herein contained shall be construed as a limitation on Artist's rights under any copyright laws to which the Work may be subject.

NOTICE. ARTICLE FOURTEEN: Artist and Collector mutually covenant that there shall be permanently affixed to the Work a NOTICE of the existence of this Agreement and that ownership, transfer, exhibition and reproduction of the Work are subject to the covenants herein, said NOTICE to be in the form of the specimen hereunto annexed and made a part of this Agreement.

(a) Because the Work is of such nature that its existence or essence is represented by documentation or because documentation is deemed by Artist to be part of the Work, the permanent affixing of said NOTICE to the documentation shall satisfy the requirements of this article.

TRANSFEREES BOUND. ARTICLE FIFTEEN: In the event the Work shall hereafter be transferred or otherwise alienated from Collector or Collector's estate in any manner whatsoever, any transferee taking the Work with notice of this Agreement shall in every respect be bound and liable to perform and fulfill each and every covenant herein as if such transferee had duly made and subscribed a properly executed TRANSFER AGREEMENT AND RECORD in accordance with ARTICLE TWO and ARTICLE FIVE herein at the time the Work was transferred to him or her.

EXPIRATION. ARTICLE SIXTEEN: This Agreement and the covenants herein shall be binding upon the parties, their heirs, legatees, executors, administrators, assigns, transferees and all other successors in interest and the Collector's covenants do attach and run with the Work and shall be binding to and until twenty-one (21) years after the deaths of Artist and Artist's surviving spouse, if any, except that the covenants set forth in ARTICLE SEVEN, ARTICLE EIGHT and ARTICLE TEN herein shall be binding only during the life of the Artist.

WAIVERS NOT CONTINUING. ARTICLE SEVENTEEN: Any waiver by either party of any provision of this Agreement, or of any right hereunder, shall not be deemed a continuing waiver and shall not prevent or estop such party from thereafter enforcing such provision or right, and the failure of either party to insist in any one or more instances upon the strict performance of any of the terms or provisions of this Agreement by the other party shall not be construed as a waiver or relinquishment for the future of any such terms or provisions, but the same shall continue in full force and effect.

AMENDMENT IN WRITING. ARTICLE EIGHTEEN: This Agreement shall not be subject to amendment, modification, or termination, except in writing signed by both parties.

ATTORNEYS' FEES. ARTICLE NINETEEN: In the event that either party shall hereafter bring any action upon any default in performance or observance of any covenant herein, the party aggrieved may recover reasonable attorneys' fees in addition to whatever remedies may be available to him or her.

IN WITNESS WHEREOF, the parties have set their hands and seals to this Agreement as of the day and year first above written.

SPECIMEN - SPECIMEN - SPECIMEN

NOTICE

Ownership, Transfer, Exhibition and Reproduction of this Work of Art are subject to covenants set forth in a certain Agreement made the day of , 19 , by and between

....
(Artist)

and ....

....
(Collector)

the original of which is on file with ....
.... at
....

SPECIMEN - SPECIMEN - SPECIMEN

TRANSFER AGREEMENT AND RECORD

To:

Know ye that ....

residing at ....

has this day transferred all his right, title and interest in that certain Work of art known as:

Title: Material:
Identification #: Dimensions:
Date: Description:

to residing at , transferee, at the agreed price or value of . Transferee, hereby expressly ratifies and affirms all the terms of that certain Agreement made by and between and on the day of , 19 , and agrees to be bound thereby and to perform and fulfill all of Collector's covenants set forth in said agreement.

Done this days of , 19 ,
at

■

FRANKLIN FELDMAN AND STEPHEN E. WEIL

ART WORKS:
LAW, POLICY, PRACTICE (MATERIALS AND COMMENTARY)

95–97 (1974)

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The year 1970 was a tumultuous one in the New York art world. Horror at the still escalating war in Vietnam, frustration over domestic events (and especially the killings at Kent State), and the surging demands that women and black artists receive greater recognition—all suddenly combined to produce an unprecedented militancy among many artists and their supporters.

Under the banners of such groups as the Art Workers Coalition, the New York Art Strike, Women Students and Artists for Black Art Liberation and the Emergency Cultural Government, mass meetings were called, various demands circulated and actions planned and taken against museums. The Annual Meeting of the American Association of Museums—held in New York that June—was disrupted when artists took over the podium on its opening day. The artist Robert Morris succeeded in closing the exhibition of his work at the Whitney Museum. The exhibition *Using Walls* at the Jewish Museum was crippled by the withdrawal of other artists. In the ensuing turmoil, the art world polarized into a "we" of certain artists, critics and dealers—and a "they" of nearly everyone else.

It was against this background that *The Artist's Reserved Rights Transfer and Sale Agreement* (hereinafter the "Agreement") was formulated. Taken together with its explanatory preface by the dealer Seth Siegelaub, it is an extraordinary document. For a dry legal instrument, it is remarkably redolent of the time and place of its drafting. Its underlying sense is that collectors have been "ripping off" the artists for many years, that the artists can only end this "rip off" by finding some common solution, and that the universal employment of the Agreement itself would constitute such a solution, with, as Mr. Siegelaub wrote, "no organization, no dues, no government agency, no meetings, no public registration, no nothing–just your will to use it."

Despite the good intentions with which it was conceived and the great ingenuity lavished upon it by Robert Projansky in its preparation, the Agreement has found only the most sporadic use. The problems of *droit de suite* are difficult enough in a civil law setting. The attempt to graft a *droit de suite* on to American law through the vehicle of contract only compounds them. Chiefly, these difficulties lie at the prospective purchaser's end: and despite Mr. Siegelaub's assertions to the contrary—see the section of his preface entitled *The Facts of Life: You, the Art World and The Agreement*—they are substantial.

Assuming that the original purchaser of a painting is fully prepared to give the artist a 15 percent share of any appreciation he might realize on its resale, the Agreement would still present him with these problems:

1. Unless he can find a second purchaser *also* willing to sign the Agreement, he cannot sell the painting at all without risking an incalculable liability that could–at least as the Agreement is interpreted in its preface–exceed his total proceeds from such resale. Alternately, the resale price he might be able to obtain from a second purchaser willing to sign the Agreement might be well below that which might be obtained from a second purchaser not so willing. In the latter case, the economic detriment involved in signing the Agreement would not merely be the 15 percent share of appreciation paid to the artist but the possibly far greater loss of a better resale price.

2. There is no practical way by which the original purchaser can sell the painting at auction without breaching the covenant set forth in Article Five, and it is dubious whether any auction gallery would accept the painting for sale knowing that no bid could be honored without first ascertaining the bidder's willingness to adopt the Agreement as his own.

3. The problems of inheritance seem insuperable. What would happen, for example, if the painting formed part of a residuary estate left to the original purchaser's issue, some of whom might be minors and less than all of the others of whom might be willing to adopt the Agreement? To confront a prospective purchaser with such drastic testamentary restrictions as the Agreement purports to do, as well as to impose what is tantamount to an additional estate tax must, necessarily, be chilling to sales.

There are other problems. If a resale, as is commonly the case, is made on a commission basis, there is no provision for taking the cost of this commission into account in determining the realized appreciation. The artist's retained and absolute right to veto any public exhibition of the painting (Article Seven) would be a condition virtually impossible for a museum to accept and, for a non-museum purchaser, might render impossible any future gift of the painting to a museum. (As to this last, there is not only the problem of whether a museum would accept the painting and its accompanying Agreement, but also the question as to what impact the Agreement would have on the painting's fair market value for charitable deduction purposes.) For a museum, the artist's right periodically to withdraw the work (Article Eight) would present further problems.

At best, works of art are not the most liquid of investments. The Agreement, by stripping away so many of a purchaser's rights, reduces their liquidity further. Rather than operate for the well-being of artists, its universal employment might have just the opposite effect. If a painting so burdened with restrictions should command a lower price to begin with, then only the relatively few artists whose works show substantial appreciation would benefit under the Agreement. The others would have nothing to show for it but an initially lower price. And while no provision is made for sharing *de*preciation–the collector has no downside partner–the majority of artists would still be the losers.

Many of the valuable features of the Agreement–the covenant against destruction, alteration, etc., in Article Nine, the provisions as to repairs in Article Ten and the forthright handling of reproduction rights in Article Twelve–might well be embodied in an agreement between the artist and an original purchaser. To attempt to bind subsequent owners, by agreement, however, seems to create more problems than it solves. Covenants run no more gracefully with works of art than with most chattels.

THE CHARLES JURRIS CONTRACT

/t

The following contract is loosely based on an earlier, and by now well-known contract which was prepared by Robert Projansky, Esq. Many of Mr. Projansky's ideas and some of his actual provisions are included. However, the present contract seeks to respond to an apparent need for a simpler and more practicable contract which achieves many of the results toward which the Projansky contract addressed itself. To the best of our ability, we have attempted to use clear and forthright language, and to avoid, to the greatest extent possible, internal cross-references.

Practical experience has shown that the vast majority of collectors are extremely reluctant to submit to any continuing contractual obligations to the artists from whom they purchase works of art; almost none, to our knowledge, have been willing to execute the Projansky contract as written. This contract would, we believe, achieve wider acceptance because it both seeks to secure a somewhat more modest package of rights for the artist, and it provides certain safeguards for the collector which direct experience has shown make the contract more palatable to collectors. The most important difference between this contract and the Projansky version is that this contract seeks to secure a royality for the artist only on the first resale of the work. This eliminates the immensely complicated system of ongoing contracts envisioned by Projansky and it makes the contract substantially more acceptable to the collector in that it does not restrict the salability of the work. Under the Projansky system, the collector was entitled to sell only to a purchaser who would himself enter into a new contract with the artist.

Even in this reduced form, we do not expect that any substantial number of collectors will be willing to enter into such a contract. We do believe, however, that this contract represents a realistic starting point from which the artist may negotiate a package of contractual rights with the collector; he may have to agree to alter some of the provisions or even to omit some entirely. Nonetheless, any ongoing contractual obligation by the collector to the artist represents an advance over the state of affairs that has prevailed in the art world. For example, collectors have shown a willingness to contract to give artists the borrowing, restoration and reproduction rights which are set forth in this document.

AGREEMENT, made this . . . . days of . . . . 19 . . . ,
between . . . . (hereinafter referred to as
"Artists"), residing at . . . . , and
. . . . (hereinafter referred ot as
the "Collector"), residing at . . . .

WITNESSETH:

WHEREAS the Artist has created a certain work of art (hereinafter referred to as the "Work"), which is fully described in paragraph 1 below; and

WHEREAS the Collector desires to purchase the Work from the Artist and the Artist is willing to sell the Work to the Collector upon the terms set forth in this Agreement and not otherwise,

NOW, THEREFORE, in consideration of the mutual promises set forth in this Agreement, as well as other good and valuable consideration, the receipt of which is hereby mutually acknowledged, the parties do hereby covenant and agree as follows:

1. *The Transaction.* The Artist hereby sells to the Collector, and the Collector hereby purchases from the Artist, for a total price of $ . . . . , the Work, which is described and identified as follows:

Medium: . . . .
Dimensions: . . . .
Title: . . . .
Date (or approximate period of creation): . . . .
Size of edition: . . . .

2. *Edition and Provenance.* (a) Unless otherwise indicated in the space "Size of edition" in Paragraph 1 of this Agreement, the Work is unique. If the Work is unique, the Artist hereby convenants that he shall not produce any exact duplicate of the Work; if the Work is one of an edition, the Artist hereby convenants that the size of the edition shall not be increased after the date of execution of this Agreement.

(b) Upon receipt of a written request from the Collector, the Artist shall provide the Collector with a written statement attesting to the authenticity of the Work and setting forth the size of the edition, if any, of which the Work is a part.

3. *Care of Work.* (a) So long as the Work remains in the Collector's possession, the Collector covenants to exercise reasonable care in maintaining the Work and further covenants not intentionally to alter or destroy the Work.

(b) If the Work is damaged in any manner, the Collector shall notify the Artist of the occurrence and the nature of the damage and shall afford the Artist a reasonable opportunity to conduct, or to supervise, the restoration of the Work.

(c) If the Artist does not take steps to commence the restoration of the Work within thirty (30) days after receipt of notice of damage from the Collector, the Collector shall be free to make whatever arrangements he deems appropriate for the restoration of the Work.

(d) Nothing contained in this paragraph 3 shall be construed to require that the Collector cause or permit the Work to be moved from the place where it is usually kept in order to allow the Artist to conduct, or to supervise, its restoration.

4. *Artist's Right to Borrow.* (a) The Artist reserves the right, upon giving the Collector reasonable notice of his intention to do so, to borrow the Work from the Collector in order to include it in a public exhibition of the Artist's works. The Collector shall have the right, before permitting the Artist to borrow the Work, to demand the submission, by the Artist or by the exhibiting institution, of documents evidencing adequate insurance coverage on the Work and prepayment of shipping charges to and from the exhibiting institution.

(b) The Artist shall not be entitled to borrow the Work more than once in any twelve-month period or for any single period longer than six (6) weeks.

(c) If the Artist borrows the work for inclusion in a public exhibition, it shall be the Artist's responsibility to ensure that the exhibiting institution identifies the work as belonging to the Collector.

5. *Notices to Be Supplied By Collector.* (a) If the Collector moves from the address set forth at the opening of this Agreement, he shall promptly notify the Artist of his new address. The Collector shall also promptly notify the Artist of any subsequent changes of address.

(b) If the Collector lends the Work to any museum, gallery, or other institution for purposes of exhibition or otherwise, the Collector shall promptly notify the Artist that the Work has been so lent. If the Work is to be publicly exhibited, such notice shall include the name of the exhibiting institution, the title of the exhibition, the dates of the exhibition, and the name of the curator or other person, if any, in charge of the exhibition.

6. *Reproduction*. (a) The Collector shall be entitled to permit the reproduction of the Work in books, art magazines, and exhibition catalogues, as he shall see fit.

(b) Except as provided in subparagraph (a), the Artist hereby reserves all rights whatsoever to copy or reproduce the Work and the Collector agrees not to permit such reproduction without first securing the written consent of the Artist.

(c) Nothing contained in this Paragraph 6 shall be construed as requiring that the Collector afford access to the Work for purposes of its being photographed, copied, or reproduced.

> (d) [There may be inserted here a subparagraph governing the division between Artist and Collector of any fees received for a reproduction of the Work which the Artist authorizes pursuant to 6 (b).]

7. *Transfer of Work*. (a) If the Collector, at any time after the execution of this Agreement, sells the Work, he shall pay to the Artist a sum equal to fifteen per cent. (15%) of the excess of the gross amount realized from the sale of the Work over the price set forth in Paragraph 1 of this Agreement.

(b) If the Collector, at any time after the execution of this Agreement, exchanges, barters, or trades the Work for another work of art, he shall pay to the Artist a sum equal to fifteen per cent. (15%) of the excess of the fair market value of the work of art which he receives over the price set forth in Paragraph 1 of this Agreement.

(c) The Collector may, at any time, donate the Work to a museum and, in the event of such donation, no payment shall be required to be made to the Artist. If, however, at any time after the execution of this Agreement, the Collector donates the Work to any institution other than a museum and takes a tax deduction in respect of such donation, he shall pay to the Artist a sum equal to fifteen per cent (15%) of the excess of the tax deduction so taken over the price set forth in Paragraph 1 of this Agreement.

(d) If the Collector, at any time after the execution of this Agreement, gives or transfers the Work to to any person in any manner other than those enumerated in subparagraphs (a) through (c) of this Paragraph 7, he shall pay to the Artist a sum equal to fifteen per cent (15%) of the excess of the fair market value of the Work at the time of such transfer over the price set forth in Paragraph 1 of this Agreement.

8. *Duration and Effect.* This Agreement shall remain in full force and effect until five (5) years after the death of the Artist and shall operate to bind the parties as well as their heirs, legatees, executors, and administrators. However, the obligations imposed upon the Collector by Paragraphs 3(b) and 4 of this Agreement shall terminate immediately upon the death of the Artist.

9. *Construction.* This Agreement shall be construed in accordance with the laws of the State of ....

10. *Headings.* Paragraph headings have been included in this Agreement solely for purposes of convenience and such headings shall not have legal effect or in any way affect the extent or interpretation of any of the terms of this Agreement.

IN WITNESS WHEREOF the parties have signed this Agreement as of the date first above written.

....
Artist

....
Collector

■

AUTHORS' NOTE. In a telephone conversation, Mr. Projansky indicated that the Jurrist contract was prepared in order to facilitate the sale of a piece to a New York museum. Despite its dilution of the rights provided for in the Siegelaub-Projansky contract, the museum rejected this contract as being too favorable to the artist. However, the Seattle Arts Commission has used a similar contract for works commissioned under its "1% for Art" program.

THE ED KIENHOLZ AGREEMENT

(AUTHORS' NOTE. Ed Kienholz is a noted sculptor.)

AGREEMENT OF PURCHASE AND SALE WITH RESERVED INTEREST

THIS AGREEMENT made this .... day of ...., 19 ..., by and between .... (hereinafter "Dealer") and .... (hereinafter

"Collector"), for the benefit of Edward Kienholz, hereinafter "Kienholz."

WITNESSETH:

WHEREAS, Kienholz has created that certain work of art, a photograph of which is annexed hereto, commonly known as .... (hereinafter "The Work"); and

WHEREAS, Collector desires to purchase The Work from Dealer subject to a reserved interest therein to Kienholz;

NOW, THEREFORE, in consideration of the foregoing premises and the mutual covenants hereinafter set forth, the parties hereto agree as follows:

ARTICLE I.

PURCHASE AND SALE

I.A. Dealer hereby sells, transfers, sets over and assigns The Work to Collector and Collector hereby buys and accepts The Work, subject to the interest reserved to Kienholz in Article II.

I.B. The purchase price shall be the sum of $........, payable in full in lawful money of the United States upon the execution of this Agreement.

ARTICLE II.

RESERVED INTEREST

II.A. Parties hereby mutually reserve to Kienholz a fifteen percent (15%) interest (hereinafter "the interest") in and to The Work payable out of the gross profits (hereinafter "profits") to be derived or obtained from any and all future sales, transfers, trades or charitable gifts of The Work.

II.B. The sum representing the profits shall be paid in lawful money of the United States to Kienholz, concurrently with any transfer or transfers of The Work, whether by sale, trade, or charitable gift made by Collector during the term of the interest; or from insurance proceeds therefor; said sum shall likewise be paid upon each successive transfer of The Work whether by sale, trade or charitable gift during the term of the interest.

II.C. "Profits" throughout this Agreement means:

(1) The excess of the agreed price received by the transferee upon any sale, trade or assignment of The Work over the agreed price parted with by the transferee upon acquisition of The Work,

or, in the event the transferee is a non-profit institution or body acquiring The Work by gift, the amount specified in Paragraph II.D.(2).

(2) The excess of the value of The Work in the event of a transfer of The Work to a non-profit institution or body by gift over the agreed price parted with by the transferee upon his acquisition of The Work, it being conclusively presumed by the parties that the value of The Work as reflected in the transferor's federal income tax was and is the value of The Work on the date of such transfer.

II.D. The parties hereto agree that Kienholz shall have a lien upon The Work sold hereunder to Collector to secure payment of any sums due Kienholz under the terms of this Agreement and to secure compliance with each of the covenants contained herein. At any time Kienholz may affix to The Work or the base thereof for the duration of the interest, the following legend which shall not be removed:

> "Edward Kienholz, his heirs, assigns and devisees, own fifteen percent (15%) interest of this work and shall be paid fifteen percent (15%) of the gross profit derived from any sale, lease, or loan of this work and an amount equal to fifteen percent (15%) of any charitable deduction upon a gift of this work to a non-profit institution."

II.E. Collector shall advise Kienholz of any transfer, whether by sale, gift, loan, lease or trade, of The Work and shall furnish such information concerning such transfer as Kienholz may reasonably require.

II.F. Kienholz may assign his interest herein at any time and Collector shall make all payments and reports otherwise forthcoming to Kienholz to such assignee upon receiving notice of such assignment.

II.G. As used throughout this Agreement, "Collector" means ...., his heirs, assigns, beneficiaries, devisees and successors in interest.

II.H. This Agreement shall inure to the benefit of and be binding upon the parties hereto, together with their respective heirs, assigns, beneficiaries and successors in interest.

....
Dealer

....
Collector

■

NOTES AND QUESTIONS

1. What are the principal differences between the three contracts? If you were an artist, which would you prefer? Why? If you were a purchaser of art (museum, collector or dealer) which would you prefer? Why?

2. Are the objections to a statutory proceeds right made by Weil, Price and Asimow any less applicable to a contract proceeds right? Why?

3. Each of these contracts seeks to establish additional rights in the artist: rights equivalent to the moral right of integrity, for example, including the right to perform (or to supervise) restoration of damaged works; rights to control public display; etc. If moral right legislation is enacted, one such demand will be satisfied. The artist's desire for a greater economic return on her work can to some extent be satisfied merely by exercising the rights available to her under the Copyright Act. Still the unrecognized, unsuccessful artist needs money in order to be able to live decently and continue making art. Reproduction royalties, display royalties, and proceeds rights (where they exist) are of no help to such artists. By definition their work is not reproduced, hung in museums, or profitably resold. Ironically, such rights are of most value to those least in need and of least value to those most in need.

4. One attempt to provide economic aid to unrecognized artists is the *"domaine public payant,"* which is sometimes confused with the proceeds right. It is a statutory requirement that royalties continue to be paid after the copyright expires. Such royalties are paid into a fund that is used to assist and encourage living creative artists. Such a system exists in both France and Italy. In a way it resembles our National Endowment for the Arts, but with its funds coming from royalties rather than from government grants.

5. Questions about the proper methods of supporting working artists are more appropriately pursued in the next chapter, to which we now turn.

AN ECONOMIC ANALYSIS OF THE CALIFORNIA ART ROYALTY STATUTE

*by Ben W. Bolch,[*] William W. Damon,[**]
and C. Elton Hinshaw[***]*

I. INTRODUCTION

In 1976, California enacted a version of the *droit de suite*[1] designed to yield to artists a portion of the resale value of their works.[2] The statute provides that, for the life of the artist, whenever a work of "fine art"[3] is resold and the seller resides in California or the sale takes place in California, the seller or his agent must pay the artist or the artist's agent five percent of the amount of such sale.[4] While the artist may execute a written contract for a resale royalty in excess of five percent, the artist cannot accept less.[5] This article examines the probable economic impact of this legislation on the art market, museums, and the artist.[6]

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[*] Professor of Economics, Vanderbilt University.

[**] Associate Professor of Economics, Vanderbilt University.

[***] Associate Professor of Economics, Vanderbilt University; Secretary, American Economics Association.

[1] Usually translated as the "right to art proceeds," the *droit de suite*, an addition to the copyright laws of certain European nations, is designed to furnish artists with a portion of the increase in value of their works when they are resold. By 1966, Belgium, Czechoslovakia, France, Germany, Italy, Poland, Sweden, Tunusia, and Uruguay had enacted *droit de suite* legislation, and Austria, Great Britain, Holland, Norway, Portugal, Spain, and Switzerland were considering doing so. Schulder, *Art Proceeds Act: A Study Of The Droit De Suite And A Proposed Enactment For The United States*, 61 Nw. U.L. Rev. 19, 22 n.13 (1966).

In France, for example, a flat fee is payable to the artist or his heirs on the public resale of all paintings, and the fee must be paid whether the painting rises in price or not. In Italy, on the other hand, the artist is entitled to a *droit de suite* only on the increase in value of the work of art. The techniques used differ with respect to the methods of resale covered (auctions, dealer, or private), the percentage of the resale price the artist obtains, the minimum price the object must bring before the mechanism is brought into play at all, and the length of time during which the mechanism operates. *See* Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 Yale L.J. 1333, 1333-34 (1968).

[2] Cal. Civ. Code § 986 (West Supp. 1978). For the complete text of the statute, *see* Appendix *infra*.

The California Resale Royalties Act has recently withstood a constitutional challenge. *See* Morseberg v. Balyon, No. 77-240 (D. Cal. Mar. 23, 1978) (Takasugi, J.). An appeal has been filed. Morseberg v. Balyon, *appeal docketed*, No. 78-2129 (9th Cir. May 24, 1978).

[3] " 'Fine art' means an original painting, sculpture, or drawing." *Id.* § 986(c)(2).

[4] *Id.* § 986(a)(1). The statute exempts any transaction in which the gross sales price is less than $1,000 or where the resale price of the work of art is less than the seller's purchase price. *Id.* § 986(b)(2), (4).

The basic premise of the *droit de suite* is that an artist does not receive the true value of a work of art at its original sale. Proponents of the principle argue that true value is generally determined many years after the original sale and that the artist is exploited because any appreciation in value does not inure to the artist's benefit. The concept of the *droit de suite* is actually a variation on the more general doctrine of "just price," which posits that things have an objective, intrinsic value in and of themselves.[7] It is our belief that the notion of just price clouds the legal and economic analysis of the artist's right to a resale royalty.

II. An Economic Model

One may identify two general motivations for the purchase of art. The connoisseur may purchase art with the intention of treating the art as a pure consumption good. No resale is foreseen at the time of purchase, and the buyer intends merely to enjoy a flow of nonmonetary utility which accrues from ownership. In contrast, an individual or institution may purchase art at least in part for investment reasons.[8] The California statute is directed primarily at the latter type of purchaser and our analysis, therefore, will be restricted to the investment aspect of art purchasing.

It may be useful, before looking at the art market, to review some elementary notions concerning decision rules for the purchase of any asset for investment purposes. Suppose that an instrument, such as a United States Treasury bill, is to be redeemed at a known price one time period from today. In the case of a Treasury bill, the instrument carries a face redemption value, or price, P_1. P_1 is the true value of the bill one period in the future.

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[5] *Id.* § 986(a).

[6] The problems of enforcing the statute and determining its constitutionality are not treated in this article. For a consideration of these problems see Merryman, *The California Royalty Bill: Milestone or Mistake?* Am. Artist, Feb. 1977, at 60.

[7] The doctrine of just price posited that "there was such a thing as an objective value, something inherent in the commodity rather than in the minds of buyer and seller. We now have had enough experience and have made enough examination of the problem, of course, to know that no such objective value ever existed." Gras, *Economic Rationalism in the Late Middle Ages*, 8 Speculum 304, 305 (1933). Another writer has argued that Gras' characterization of just price is a vulgarization of that doctrine. *See* Dempsey, *Just Price in a Functional Economy*, 25 Am. Econ. Rev. 471, 472-73 (1935). Nevertheless, many proponents of the royalty statute appear to rely on the doctrine as it was defined by Gras.

[8] However, in recent years, investment in paintings has been shown to yield only "ordinary" returns when adjusted for risk. *See* Stein, *The Monetary Appreciation of Paintings*, 85 J. Pol. Econ. 1021 (1977).

The question that the investor wishes to answer concerns the price to pay today, P_0, for the right to receive P_1 one time period in the future. Suppose that a given investor is willing to pay $9433.96 for the right to receive $10,000 at the end of one time period. In this case, the investor has revealed that he requires a rate of return of six percent on the investment: P_1/P_0 = $10,000/$9433.96 = 1.06. In general, we call the required rate of return for investor *i* his internal discount rate, r_i. The bid price, P_0, the redemption price, P_1, and the discount rate, r_i, will be related as follows for the investor:

$$P_0 = P_1/(1 + r_i)$$

Table 1 shows the bid prices of five investors for a $10,000 redemption price after one time period. Notice that as discount rates increase, bid prices fall.

TABLE 1

Bid Price in Terms of a Redemption Price of $10,000 at Selected Discount Rates

Investor i	*Discount Rate* r_i	*Bid Price* $P_0 = \$10,000 / (1 + r_i)$
1	0.01	$9900.99
2	0.06	9433.96
3	0.10	9090.91
4	0.20	8333.33
5	0.50	6666.67

With this background in mind we are ready to turn to an analysis of sales of works of art. We begin by considering a single artist who wishes to sell an original and unique work of art for the first time. Since the given work cannot be expanded by further production,[9] the work will sell only if a buyer offers a price at least as high as the minimum price which is acceptable to the artist. In the language of economics, the selling price will be determined completely by prospective buyers, provided that some offer price is at least as high as the artist's reservation price. If the offer prices are all lower than the artist's reservation price, no sale will take place.[10]

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[9] In contrast, records, sheet music, books, and other reproducible forms of art may be expanded by additional production. It is precisely this distinction that makes unpersuasive an appeal to the argument that since reproducible art carries a royalty, so should nonreproducible art.

Now let us assume that the artist is faced with a decision as to whether he should sell his art today or hold his art as an investment for one time period. Let us also assume that the artist and the bidders are in agreement as to the future price of the art one time period from today, P_1.[11] In this situation, both the artist and the prospective buyers have discount rates which will value consumption one period from today in terms of consumption today. If there are many prospective purchasers with different discount rates as in Table 1, then the purchaser with the lowest discount rate, which we shall call $r_{\bullet}$, will offer the highest bid to the artist and, since we ignore risk, the bid will be $P_1/(1 + r_{\bullet})$. The artist, on the other hand, has the option of refusing to sell the work of art, and may prefer to invest in his own art and to receive its future price, P_1, after one time period. In this case, the artist will value the work of art at $P_1/(1 + r_A)$, where r_A is the artist's discount rate. The sale will take place whenever

$$P_1/(1 + r_{\bullet}) > P_1/(1 + r_A) \qquad \text{Equation (1)}$$

which reduces to

$$r_A > r_{\bullet}. \qquad \text{Equation (2)}$$

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[10] A particular work of art might be offered for sale in a sealed bid auction, in a competitive bid auction, on display at a given price (which we would denote as the artist's reservation price) either subject to bargaining or not, or through any of several other institutional arrangements. Although the specific institutional arrangement may affect the ultimate transaction price, it will not affect the conceptual analysis of the economic impact of the statutory imposition of a royalty. Our assumption of a sealed bid market structure is motivated by clarity of exposition, rather than a belief that it is the most prevalent structure. All of our major conclusions hold under the more realistic, but more difficult to present, assumption that the artist sets the price of the work at his reservation price and buyers either take or refuse to take the work at that price; the only difference is that the artist will never be offered a price higher than his reservation price.

[11] The effect of this assumption of homogeneous expectations of the market participants is discussed at a later point in this article. *See* text following note 17 *infra*.

Thus, a sale will take place if the artist has a greater present need for consumption than the buyer with the least present need for consumption among all prospective buyers.

To the extent that a "starving" artist is facing a "wealthy" buyer, the situation represented by equation (2) is likely to obtain. However, there is no exploitation of the artist in this situation. Although both the artist and the buyer agree on the future price of the work, they differ in their preferences for present consumption relative to future consumption. In a noncoerced exchange, both parties benefit. However, at some later time, because of increased wealth or for other reasons, the artist may have a lesser need for present consumption and may in retrospect view the sale with regret, feeling that a just price was not obtained at the time of original sale.

III. THE CALIFORNIA STATUTE

The California statute levies a royalty of five percent upon the resale price of a work of art at the end of the buyer's holding period. Thus, the best offer that will be made for the art today is

$$(1 - t)\ P_1/(1 + r_.) \qquad \text{Equation (3)}$$

where $t = 0.05$, or 5%. Compared to equation (1), the offer has been reduced by the factor $(1 - t)$, or to 95% of the offer made without the royalty. This reduction is reasonable, since the buyer is clearly aware that upon resale he will realize only 95% of P_1, the other 5% being returned to the artist as a royalty. Under the statute, the artist will not only receive today the amount given by equation (3), but he will also earn tP_1 (5% of the resale price) at the end of the buyer's holding period. Given the discount rate of the artist, r_A, the future payment tP_1 will be worth $tP_1/(1 + r_A)$ to the artist today. The artist will compare the sum of the present and discounted future payment with the discounted amount that he may expect to receive by holding the art as an investment. A sale will take place whenever

$$\frac{(1 - t)P_1}{(1 + r_.)} + \frac{tP_1}{(1 + r_A)} > \frac{P_1}{(1 + r_A)} \qquad \text{Equation (4)}$$

As before, equation (4) implies a sale whenever $r_A > r_.$.

Let us now explore the meaning of equation (4). If there is no royalty, $t = 0$ and equation (4) reduces to equation (1), as it should. Furthermore, if there is a 100% royalty, $t = 1$, the entire resale price is returned to the artist, and the term $(1 - t)P_1/(1 + r_*)$ becomes zero. In this case the artist will never be able to sell his art to a rational investor. Therefore, as the royalty increases toward 100%, the bid price decreases. However, the situation in which the artist will prefer to sell the work rather than to hold it as an investment does not change as a result of the resale royalty. That is, the artist will prefer to sell his work as long as $r_A > r_*$, with or without the royalty. This fact is demonstrated by Table 2.

TABLE 2

Alternative Compensation to the Artist From Holding or Selling Art, With and Without a 5% Royalty*

	HOLD ART	SELL ART			
		No Royalty	*5% Royalty*	*5% Royalty*	*5% Royalty*
Artist's Discount Rate, r_A	(1) Present Value of Future Compensation (Reservation Price)[a]	(2) Present Compensation (Highest Bid)[b]	(3) Present Compensation (Highest Bid)[c]	(4) Present Value of Future Resale Royalty[d]	(5) Total Present Value[e]
0.01	$9900.99	$9433.96	$8962.26	$495.05	$9457.31
0.06	9433.96	9433.96	8962.26	471.70	9433.96
0.10	9090.91	9433.96	8962.26	454.55	9416.81
0.20	8333.33	9433.96	8962.26	416.67	9378.93
0.50	6666.67	9433.96	8962.26	333.33	9295.59

* $P_1 = \$10,000$, $r_* = 0.06$

[a]) $10,000 / $(1 + r_A)$

[b]) $10,000 / (1.06)

[c]) (.95) ($10,000) / (1.06)

[d]) (.05) ($10,000) / $(1 + r_A)$

[e]) Col. (3) + Col. (4).

The price of the art at the end of the holding period, P_1, is assumed to be $10,000, and the discount rate of the highest bidder, r_*, is assumed to be six percent. Column (1) shows the present value of the future compensation that an artist may expect from holding his art at various discount rates, r_A, that is, the artist's reservation price.

Column (2) depicts the present compensation to the artist from a sale of the art in the absence of any resale royalty. We see that if $r_A = 0.01$, the artist will prefer to hold rather than sell his art; his reservation price in column (1) of \$9900.99 exceeds the highest bid in column (2) of \$9433.96. If $r_A = 0.06$ the artist is indifferent to the sale of his work, and if $r_A > 0.06$, selling is preferable to holding. Our previous hypothesis that selling is preferable to holding if $r_A > r$. is verified.

Columns (3) through (5) show the present and discounted compensation under the five percent California royalty statute. Again, if $r_A = 0.06$, the artist is indifferent to selling or holding. But, as column (5) shows, if $r_A > 0.06$, the artist always receives less total discounted compensation with the five percent royalty than he would without a royalty.

The following results are evident from Table 2:

1. If an artist sells his work, his discount rate is always equal to or larger than that of the buyer.
2. An artist who sells his work will always have a smaller discounted compensation under a scheme where there is a positive resale royalty than under a scheme where there is no resale royalty.

The obvious question is: Who does benefit from the statute? One answer is that any artist who sells his work before the market reflects the new price structure caused by the royalty statute and who lives to see his art sold at least once again stands to benefit. Such an artist will have received compensation at the initial sale that was not adjusted for the royalty and, in addition, will receive the undiscounted value of any royalties incident to any future resale(s). Therefore, under this model, a third result is apparent:

3. The California statute tends to benefit older established artists, not younger, less established artists.[12]

One probable impact of the statute will be to reduce the original bid prices for art works once buyers adjust to the existence of the resale royalty. Thus, as a result of the legislation, artists may be forced to invest in their own work, contrary to what they might consider to be in their own self interest. Because the artist cannot waive the "right" to receive at least five percent of the resale price of his art,[13] the statute, rather than extending the rights of the artist, may actually constrict those rights.

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[12] Results 2 and 3 verify criticism of the legislation to the effect that the artist who benefits is the one who has an established reputation and a secondary market for his work. *See* Hochfield, *Legislating royalties for artists*, ART NEWS, Dec., 1976, at 52; Hochfield, *Artists rights: Pros and cons*, ART NEWS, May, 1975, at 22.

Result 2 implies that at the time of original sale, the California statute requires the artist who sells his work to accept a lower price now for the prospect of future compensation (*i.e.*, a percentage of the later resale price). Thus, the statute implicitly forces the artist to invest in his own work. The artist must forego in current compensation the difference between the price in the absence of the statute and the lower bid price which will result from the statute. In return, he is promised some future compensation which results from the resale of the work. If the return to the artist on this implicit investment is equal to or greater than his discount rate, r_A, the artist is not adversely affected. In fact, the rate of return will be $r_* = (P_1 - P_0)/P_0$, and the implicit investment that the statute imposes is advantageous to the artist only if $r_* > r_A$. However, as we previously demonstrated, the artist will sell his work only if $r_A > r_*$. Thus, the two conditions necessary for the statute to benefit the artist at the time of the original sale are mutually exclusive.

Result 3 demonstrates that only established artists are likely to benefit from the statute and then only if their works were originally sold in the absence of the royalty provision when potential buyers did not adjust their bid prices downward to account for the royalty. According to the Art Dealers Association, only about fifty living artists have a resale market for their works, and ninety-nine percent of all art depreciates in value.[14] Thus, if the statute benefits anyone, it benefits the select few who need protection the least.[15]

Our analysis of the impact of the California statute may appear to be excessively abstract. First, it treats art as though it were merely another form of investment, and even economists realize that an original Rauschenberg is different from a United States Treasury bill. However, the statute is intended to capture a portion of the returns accruing to the art investor and to transfer them to the artist. To the extent that art is bought for investment purposes its purchase can be analyzed using investment decision rules.

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[13] CAL. CIV. CODE § 986(a) (West Supp. 1978). The statute clearly violates the maxim: *Quilibet potest renuniciare juri pro se introducto* (Anyone may waive a right asserted in his behalf). *See* Burgettstown Nat'l Bank v. Nill, 213 Pa. 456, 460, 63 A. 186, 187 (1906).

[14] *See* Hochfield, *Legislating royalties for artists*, ART NEWS, Dec., 1976, at 52.

[15] An analysis of a capital gains royalty, whereby a percentage royalty would be imposed only on the increase in value at resale, reveals a similar impact upon the artist. The same three results can be shown to hold. The reduction in the original bid price, P_0, would be less substantial in the case of a capital gains royalty than would be the reduction with the resale royalty, if the percentage royalties were of equal size. Thus, a royalty on the increase in value would be less deleterious than the resale royalty. However, neither royalty proposal is to the advantage of the artist at the time of the original sale of his work. For an application of the capital gains royalty see Projansky & Siegelaub, *The Artist's Reserved Rights Transfer and Sale Agreement*, in ART WORKS: LAW, POLICY, PRACTICE 81-94 (F. Feldman & S. Weil eds. 1974).

Second, the analysis assumes that art is sold on a sealed bid auction basis. However, our basic findings do not depend on the nature of the institutions in the marketplace. Rather they are based on assumptions about the behavior of buyers and sellers when an implicit tax is levied upon a future sale.[16]

Third, the analysis is based on a model that differs in three important respects from the actual market for art. It was implicitly assumed that the art work would be resold only once during the life of the artist, that all parties in the market held homogeneous expectations of the future selling price of a specific art work, and that all parties acted as though they were certain that this price would be realized one time period in the future.

To the extent that it is reasonable to assume that an art work will have multiple changes of ownership during the life of the artist, the preceding analysis is an understatement of the statute's full effect upon bid prices. An analysis of the case of multiple sales shows that: (a) The statute will lead to a more significant reduction in the current bid price of an art work than was demonstrated above; (b) that the burdens and benefits, though magnified, will be allocated as described above; and (c) that the conditions necessary for an exchange to take place between the artist and a buyer are the same as those described above.[17]

We are currently studying the implications of the more realistic assumption that the artist and buyers may hold different and uncertain beliefs about the future market price of a particular work. We do not anticipate that heterogeneous expectations and differing attitudes toward risk-bearing on the part of market participants will change the incidence of the burdens and benefits of the statute.

Finally, our formal model leads to conclusions which have been widely noted by those knowledgeable in the art market.[18] We view the consistency of these conclusions as a confirmation that it is not necessary to consider the specific institutional arrangements of the art market in order to predict the impact of the statute.

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[16] *See* note 10 *supra* and accompanying text.

[17] The mathematical analysis necessary to verify these conclusions is simply an extension of the equations outlined above. The complete analysis is on file in the office of the Connecticut Law Review.

[18] *See, e.g.*, Elsen, *The art bills: Pluses and minuses*, ART NEWS, Oct. 1977, at 52-54.

IV. THE STATUTE'S EFFECT ON MUSEUMS

One of the effects of the statute is to provide a windfall gain to artists whose works were sold at full market value before the market anticipated the resale royalty. Of course, the loss will be borne by the present owners of such art at resale. Since museums are active as both buyers and sellers of art, museums located in California will suffer some loss upon the resale of the works of any living artist.

In order to measure the full impact of the statute on a California museum, the differential effects upon categories of works must be identified. Since losses would only be incurred for works of living artists, the effect of the statute depends upon the proportion of the museum's collection devoted to living artists. Within this classification further differentiation is required since the extent of the decrease in market value will depend upon the number of times a work is expected to be sold within the lifetime of the artist.[19] Thus, the decline in market value of works by older artists would be smaller, proportionately, than the decline in market value for works of younger artists, since the expected number of transfers of ownership of the senior artist's works in his remaining lifetime would be smaller. Thus, the overall decline in market value of a museum's portfolio depends upon its relative investment in the works of living artists and the age distribution of artists represented in the collection. A collection devoted to young artists would be the most severely devalued.

Perhaps in anticipation of its effect upon large collections, the statute ameliorates the impact by providing that the royalty shall not apply:

> To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars ($1,000).[20]

To the extent that California museums can finance their acquisitions of young artists' works with works currently in their collection by young artists, the reduced market values of the works to be traded would tend to offset one another. Such an exchange of works of comparable market value would not be subject to the royalty.

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[19] For a discussion of this phenomenon *see* note 17 *supra* and accompanying text.
[20] CAL. CIV. CODE § 986(b)(5) (West Supp. 1978).

V. CONCLUSION

The California statute is a misguided attempt at paternalism which may afford windfall gains to a few living artists whose work was sold prior to market knowledge of the five percent resale royalty. For other artists, economic theory and common sense indicate that the market will on the average simply reduce the original selling price of the art to compensate for expected future royalties.

Because the legislation will result in lower bid prices at the time of a work's first sale, the artist will be forced to accept a lower current price in exchange for a promise of a portion of the future resale price. Since very little art has a secondary market, the net result will be to penalize the unknown, struggling artist. Only art sold before the enactment of the legislation will yield a net benefit, upon resale, to the artist. Once the market adjusts its expectations to include the royalty, artists will not benefit.

The positive net effect on an established artist may be small. Established artists benefit from any increase in the prices of their existing works because of the positive impact that such increases have on the value of their unsold and future works. Thus, while the California statute may afford windfall gains on previously marketed art, it should also reduce the market price of art sold in the future.

The windfall gains that accrue to living established artists are at the expense of losses to dealers, museums, and the major owners of art. Museums specializing in the work of contemporary artists will suffer the greatest damage. Currently, many museums buy portfolios of contemporary artists' works and hold them, in part, for investment reasons. To the extent that the resale royalty discourages such behavior, the market for new art is damaged.

Profitable resale of art work is rare. Few artists have a secondary market and few works of art appreciate significantly in value. The resale royalty law will result in only a small economic gain to a few and an economic loss to many. It should be repealed for the sake of the artists affected.

APPENDIX

CAL. CIV. CODE § 986

Work of fine art; sale; payment of percentage to artist or deposit for Arts Council; failure to pay; action for damages; exemptions

(a) Whenever a work of fine art is sold and the seller resides in California or the sale takes place in California, the seller or his agent shall pay to the artist of such work of fine art or to such artist's agent 5 percent of the amount of such sale. The right of the artist to receive an amount equal to 5 percent of the amount of such sale is not transferable and may be waived only by a contract in writing providing for an amount in excess of 5 percent of the amount of such sale.

(1) When a work of art is sold at an auction or by a gallery, dealer, broker, museum, or other person acting as his agent for the seller the agent shall withhold 5 percent of the amount of the sale, locate the artist and pay the artist.

(2) If the seller or agent is unable to locate and pay the artist within 90 days, an amount equal to 5 percent of the amount of the sale shall be transferred to the Arts Council.

(3) If a seller or his agent fails to pay an artist the amount equal to 5 percent of the sale of a work of fine art by the artist or fails to transfer such amount to the Arts Council, the artist may bring an action for damages within three years after the date of sale or one year after the discovery of the sale, whichever is longer.

(4) Moneys received by the council pursuant to this section shall be deposited in an account in the Special Deposit Fund in the State Treasury.

(5) The Arts Council shall attempt to locate any artist for whom money is received pursuant to this section. If the council is unable to locate the artist and the artist does not file a written claim for the money received by the council within seven years of the date of sale of the work of fine art, the right of the artist terminates and such money shall be transferred to the operating fund of the council as reimbursement to fund programs of the council.

(6) Any amounts of money held by any seller or agent for the payment of artists pursuant to this section shall be exempt from attachment or execution of judgment by the creditors of such seller or agent.

(b) Subdivision (a) shall not apply to any of the following:

(1) To the initial sale of a work of fine art where legal title to such work at the time of such initial sale is vested in the artist thereof.

(2) To the resale of a work of fine art for a gross sales price of less than one thousand dollars ($1,000).

(3) To a resale after the death of such artist.

(4) To the resale of the work of fine art for a gross sales price less than the purchase price paid by the seller.

(5) To a transfer of a work of fine art which is exchanged for one or more works of fine art or for a combination of cash, other property, and one or more works of fine art where the fair market value of the property exchanged is less than one thousand dollars ($1,000).

(c) For purposes of this section, the following terms have the following meanings:

(1) "Artist" means the person who creates a work of fine art.

(2) "Fine art" means an original painting, sculpture, or drawing.

(d) This section shall become operative on January 1, 1977, and shall apply to works of fine art created before and after its operative date.

(e) If any provision of this section or the application thereof to any person or circumstances is held invalid for any reason, such invalidity shall not affect any other provisions or applications of this section which can be effected, without the invalid provision or application, and to this end the provisions of this section are severable.

138. ART RESALE RIGHTS AND THE ART RESALE MARKET:
*An Empirical Study**

By TOM R. CAMP**

The occasion, recorded in E.J. Vaughn's 1974 documentary film, "America's Pop Collector: Robert C. Scull—Contemporary Art at Auction," was an October 1973 Sotheby Parke Bernet, Inc. auction of works from the Robert Scull collection. Robert Rasuchenberg's *Thaw*, which Scull had purchased from Rauschenberg for $900 in 1958, resold for $85,000. The price, although newsworthy itself, was far less important than what occurred after the auction. Artist Rauschenberg approached collector Scull, laughing as if uncontrollably, and gave him a hard but friendly push, saying, "I've been working my ass off for you to make all this profit." Although not eloquently stated, Rauschenberg's comment embodied a sense of frustration and indignation that struck a responsive chord with many other artists and some of the public. It seemed wrong that the artist should have received only $900 for a work of art worth $85,000.

The Rauschenberg-Scull affair crystalizes many of the issues in the current debate about art resale rights and is cited in most discussions about them. Art resale rights give artists a portion of the proceeds from resale of their works. They take several forms. Some resale rights give the artist a share of the total proceeds received by a seller; some give a share only of any price appreciation since the previous sale of the work. Resale rights may be created by contract or by statute. However, contractual resale rights are both difficult to negotiate because of buyer and dealer opposition and are hard to enforce against subsequent purchasers. Most of the recent advocacy has been in support of statutory resale rights.

Several civil law nations have had art resale statutes known as the *droit de suite* for a number of years. The first was enacted in France in 1920. Laws are also on the books in Algeria, Belgium, Chile, the German Federal Republic, Italy, Luxembourg, Morocco, Portugal, Tunisia, Turkey, and Uruguay. Poland once had a *droit de suite*, but seems to have abandoned it in a copyright law revision. Laws related to the *droit de suite*

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[1] Law of May 20, 1920.)

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also exist in Czechoslovakia and Yugoslavia. The success of these laws is in doubt and several of them are not even enforced.

California enacted the first art resale right in the United States in 1976.[2] California Civil Code Section 986 applies to original paintings, sculpture and drawings sold during the lifetime of the artist, either in California or by a California resident. Except for resales below a $1000 floor or the seller's purchase price, the law gives the artist a right to 5 percent of the total resale price. California's is currently the only art resale right statute in the United States, although others are under consideration. A bill introduced by Congressman Henry Waxman of California would create a national art resale right and a federal agency to enforce it.[3]

Art resale rights are still a matter of much debate. The policies and theories behind them have been argued extensively and critiqued in legal and art periodicals.[4] But in all the debate, one thing seems largely to have been ignored: There has been very little investigation of the facts. To support their arguments, both sides of the debate make some very broad assumptions about the art resale market and how an art resale right would affect it.

The proponents argue that artists suffer a serious inequity. They often sell their works at low prices only to see them resold at significantly higher prices years later. The paradigm case, which Professor Monroe Price, one of the opponents of the resale right, has characterized as a "romantic notion,"[5] is of the starving young artist creating masterpieces which must be sold to cunning collectors and dealers for a pittance. When the artist has become famous, these masterpieces are then resold at fabulous prices after years of suffering by the artist. The resale right, the proponents argue, will redress this inequity; it will provide an important right for artists and give them their fair share of the value of their works.

The opponents counter that only a very few artists have a significant resale market which would generate a resale right and that the artists with a resale market tend to be the more successful artists least in need of the resale right. Moreover, the opponents argue that the resale right will actually harm the art market: The added cost of the resale right will seriously reduce the sales of art subject to it; and more insidiously, the resale right will reduce opportunities for young and unknown artists because of the damage it will do to the art dealers who promote them.

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[2] Cal. Civ. Code § 986 (West Supp. 1978).

[3] The Visual Artists' Residual Rights Act of 1978, 95th Cong., 2d Sess. (1978).

[4] For a convenient compilation of articles on resale rights, *see* J. MERRYMAN & A. ELSEN, LAW, ETHICS AND THE VISUAL ARTS—CASES AND MATERIALS IV 100 (1978).

[5] Price, *Government Policy and Economic Security for Artists: The Case of the Droit de Suite*, 77 YALE L.J. 1333 (1968).

OBJECTIVES OF THE STUDY

This study set out to find some evidence to support or reject the assumptions about the art resale market implicit in the arguments of the proponents and the opponents. Specifically, the study tried to answer, at least tentatively, four questions:

> 1. How frequently do artists sell their works at very low prices only to see them resold at much higher prices later in their careers?
> 2. Which artists have a significant resale market and who are they?
> 3. Would the added costs of a resale right reduce the demand for art subject to it?
> 4. Would an art resale right reduce opportunities for young and unknown artists because of its effects on art dealers?

THE APPROACH OF THE STUDY

To answer these questions, one has to go to professional art dealers, the source most likely to have information about the art market. Only they have the records of art resales and sufficient contacts with the market, both of which are needed to draw any meaningful generalizations. The most comprehensive records of art resales are contained in the art auction catalogs of Sotheby Parke Bernet, Inc. Since the Rauschenberg-Scull affair grew out of a Sotheby Parke Bernet auction, it seems fitting that those auctions be used to answer some of the issues the Rauschenberg-Scull affair raised. Moreover, auction sales are probably a rough cross-section of the resale market. In any case, they are the only convenient sample of art-resales publicly available and had to form the basic source of statistics for this study.

Starting from the Scull auction in October of 1973 and running through the end of 1977,[6] a record was made[7] of original, unique works of art created by an American artist and resold at a Sotheby Parke Bernet auction for over $500 during the life of the artist or within five years of the artist's death. Records were also kept for 1977 auctions of the works of living and recently dead foreign artists' works resold for over $1000.

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[6] *See* Appendix A.

[7] *See* Appendix B.

Since art auctions are only a small portion of the art resale market, it was necessary to find a supplemental source of information. Twelve individuals representing eight art galleries or dealers in the San Francisco Bay area were interviewed in the Spring of 1978 for information about their art resales. The dealers interviewed were selected on the basis of their reputation as significant art resellers. The interviews were generally free-ranging, although loosely directed around the four objectives of this study.[8] Discussions usually lasted about one hour. Dealers were asked both for their opinions and for specific information about their own resales.

The dealers were quite free with opinions and experiences, but quite stingy with their own resale records. Their reluctance is understandable in view of the privacy which surrounds a dealer's sales and the possibility of liability for any resale rights that had not been paid.

The California law has been widely ignored by art dealers. Out of all the interviews, only one art dealer knew of even one case in which a resale right had been paid to the artist. The sale involved a work taken on consignment from a Canadian collector. When informed of the resale law in California, the collector asked the gallery to withhold the resale right and pay it over to the artist.

The possibility of legal liability for unpaid resale rights was a very real concern at the time. By coincidence, a class action suit to collect resale rights was instituted at about the time the interviews were conducted. In fact, one dealer was joined as a defendant just a few days after the interview. In order to relieve some of the apprehensions of the dealers, all interviews were conducted with the express understanding that the names of the dealers would not be revealed and that no statements would be attributed to any particular person.

THE RESULTS OF THE STUDY

The combination of the information from the auction sales and the dealer interviews allows one to draw some interesting conclusions. None of the results have been tested for statistical significance, but they seem to allow at least some tentative generalizations. Overall, one can conclude that both the proponents and the opponents of the art resale right have overstated their cases; both sides seem to have assumed too much.

The problem. The proponents of the resale right see a problem of artists creating works when they are young and unknown and selling them for very little. When the artist is well known, those early works may rise greatly in value giving the buyer fabulous profits while the artist receives nothing. The Rauschenberg-Scull affair is an obvious example. The opponents say this is not a common occurrence, but instead that it is a "romantic notion."

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[8] *See* Appendix C.

The results of this study indicate that both sides are correct to some extent. The average (mean average) age of artists at the time of the 1977 auction sales was 54 years.[9] That fits reasonably well with the assumption of the proponents that artists sell their works when they are older and better known. But the age of artists at the time the work sold was created averaged (mean average) 43 years. In averaged terms, the works resold are the works of mature artists. There are cases of works created in youth and sold in the artist's old age, but they seem rather uncommon. Two de Koonings were created when the artist was 33, forty years before the resale, but there was also one Wesselmann which was sold at auction during the same year it was created. As Table I shows, the individual cases spread out quite a bit.

TABLE I

AGE OF ARTISTS AT THE TIME OF CREATING THEIR WORKS

(numbers represent resales of living American artists during 1977 only)

age of artist	under 30	30-37	38-48	over 49
number of artists	5	32	47	29

However, most of the artists were at least in their late 30's at the time the work sold was created.

The notion of the starving young artist whose works some day resell at fabulous prices in most cases is fairly "romantic." (From the limited information available for this study, while not statistically valid, it is interesting to note that the lifespan of the successful artists who died within the period studied was no different from the lifespan of the general population.) The average age at death for American artists who died within the period of auction sales studied was 72.[10] The works that resell are more often the work of a mature rather than a young artist. One well-respected dealer had a theory to explain this result. The dealer argued that most of an artist's work is merely experiment and practice for a few truly great works. Today there is a much more willing acceptance of experiments in art, so early works may be sold. But when the great works come along, everything that led up to them is only important historically to show the development of the artist. What has continuing value and a real resale market are the great works of art by the mature artist. The auction sales of dead artists' works provide some examples of that. When an artist dies, the art world has a perspective on an entire career and can determine which works were merely the experiments and which the great works. Of the works of Josef Albers sold in 1977, three sold for between $14,000 and $16,000 and were created when Albers was between 70 and 74 years old. A work which sold for $29,000 was created when Albers was 81. Alexander Calder's most valuable works resold in 1977 were created when he was 58, 63, 69 and 71.[11]

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[9] *See* Appendix D.

[10] *See* Appendices G & H.

While works of art do rise in value after they are sold by an artist in many cases, the idea of starving young artists selling works for a pittance which resell at fabulous prices in the future is not a particularly common problem. To that extent, the opponents of art resale rights appear to be correct and the proponents incorrect in their assumptions about the art resale market.

The beneficiaries. Which artists have a resale market that might generate a resale right? The proponents seem to assume that a large number of artists will benefit, including a number of struggling artists. The opponents contend that very few artists have a significant resale market and that those who do tend to be the more successful artists. Both the auction sales and the dealer interviews indicate strongly that the opponents are correct on this issue.

Assume an art resale right like California's. It applies to the resales of the works of living artists for over $1000 and above the seller's purchase price. Because the auction catalogs do not list the seller's purchase price, that limit has been removed for this study. Over the roughly four years of art auctions recorded, 152 living American artists had resales of original art for over $1000 amounting to total sales of $7,812,250.[12] That is an average (mean average) of $12,849 in sales each year per artist, and a resale right of $642.45, assuming all the resales were at a price higher than the previous sale of the work.

The benefits of the resale right, though not overwhelming, seem real enough: 152 artists receiving about $650 each year. But that is not really the case. Resales are not evenly spread among artists; the resale market is highly concentrated among a very few artists. To begin with, only 152 living American artists had any resales over $1000 at a number of Sotheby Parke Bernet auctions over four years. But the 1970 Census listed 107,476 painters and sculptors in the United States.[15] Only 0.15% of the artists in the United States even made the list!

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[11] *See* Appendix G.

[12] *See* Appendix E.

Even among the 152 artists on the list there is significant concentration of sales. Over the four years recorded, 62 of the artists (41%) had only one resale and 25 (14%) had only two. Thus the list of artists with a significant resale market at the auctions is something less than 64. Table II shows the concentration of resales from the other side. The top five resellers had 193 resales or 27% of the 705 total resales.

TABLE II

TOP FIVE RESELLERS IN TERMS OF NUMBER OF RESALES
(numbers represent resales of living American
artists over $1000 only)

artist	number of resales	percent of all resales
Alexander Calder*	57	8%
Willem de Kooning	28	4
Larry Rivers		4
Tom Wesselmann	23	3
Kenneth Noland	19	3
Jules Olitski		3
Frank Stella		3
totals	193	27%**

*Alexander Calder died in 1976 during the sample period
**figures may not total properly because of rounding

The concentration is even more obvious in terms of the dollar value of resales. Table III shows the resales of the top five resellers in terms of the value of their resales. Interestingly enough, Robert Rauschenberg was the number one reseller. Combined, the top five had sales of $2,448,350 or 31.4% of the sales of all living American artists. The 24 artists with sales over $100,000 during the four years had resales totalling $6,043,250; approximately 16% of the artists were responsible for about 77% of the total value of the resales during the period.

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[15] (1970 Census of the Population: Subject Reports—Occupational Characteristics 1 (1973) (Table 1).

TABLE III

TOP FIVE RESELLERS IN TERMS OF DOLLARS OF RESALES
(numbers represent resales of living American
artists over $1000 only)

artist	value of resales	percent of all resales
Robert Rauschenberg	$608,250	7.8%
Willem de Kooning	574,950	7.4
Alexander Calder*	495,750	6.3
Jasper Johns	404,000	5.2
Frank Stella	365,400	4.7
totals	$2,448,350	31.3%**

*Alexander Calder died in 1976 during the sample period
**figures may not total properly because of rounding

Some proponents of art resale rights have suggested that a $1000 floor is too high. But the results do not change significantly if resales between $500 and $1000 are included.[14] An additional 39 artists would be added to the list, most of whom had only one resale recorded over the four-year period. Another 47 artists who had resales between $500 and $1000 were already on the list because of their resales over $1000. Moreover, the total value of the 128 resales of works of living American artists between $500 and $1000 was on $92,475.

Even when the floor is dropped to $500, the concentration of resales among a few artists continues. Assuming that all of these resales would qualify under a law like California's, an artist would have had to have over $2000 in sales to yield just $100 in resale right over the entire four years recorded. Only seven artists, Edward Avedisian, Ron Davis, Ray Johnson, Larry Rivers, Ed Ruscha, Andy Warhol, and Tom Wesselmann, had at least $2000 in resales between $500 and $1000.

It has also been suggested that the resale right should not be limited to the works of living artists. The proposal is usually to give the resale right the same duration as copyright, the life of the artist plus fifty years. Many of the *droit de suite* have the life plus fifty-years term. To give some idea of which artists have resale markets after their deaths, the auction resales of artists who had died within five years of the resale were also recorded.[15] During the four years recorded, eleven dead artists had 58 resales totalling $1,086,800. The same concentration of benefits among a few of the most famous and successful artists continues after the artists' deaths.

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[14] *See* Appendix F.

One of the rationales for extending the term of the resale right is based on the popular notion that the value of an artist's works rises when the artist dies. Several of the art dealers disputed that notion in the interviews. Only four artists had auction resales recorded both before and after their deaths. Table IV shows that the average prices of their works rose insignificantly or dropped. This study does not involve enough artists or resales of their works to draw any conclusions, but at least the Sotheby Parke Bernet auctions lend no support to the notion that an artist's works rise in value upon the artist's death.

TABLE IV
ARTISTS' SALES BEFORE AND AFTER DEATH
(numbers represent American artists only)

	before death		after death	
artist	number of resales	average resale price	number of resales	average resale price
Josef Albers	12	$23,654	6	$15,583
Alexander Calder	57	8,697	12	8,888
Adolph Gottlieb	7	4,800	6	4,933
Man Ray	4	6,150	1	2,000

So far figures have been given only for American artists. But the California law is not limited to American artists; its benefits extend to artists around the world. The resales of the works of living and recently dead foreign artists over $1000 were recorded for 1977.[16] Seventy-three living foreign artists had resales totalling $1,951,000 in 1977 and nine recently deceased artists had resales totally $1,347,000. The comparable figures for American artists during the same period are somewhat lower: $1,265,300 in sales by 59 living American artists in 1977 and $221,650 in sales by five recently dead artists. Foreign artists clearly have a more significant resale market than domestic artists.

Table V lists the sales of foreign artists' works by nationality of the artist. A significant portion of the dollar amount of the resales would go to the nationals of countries with the *droit de suite*. Presumably, reciprocal arrangements would allow American artists to collect resale rights on their resales in those countries. Thus, although foreign artists are dominant in the American art resale market, the art resale rights paid out of the country on those sales would be offset to some extent by the resale rights American artists would receive on their foreign resales. Nonetheless, the resale right could result in the American art market providing a real subsidy to the more successful foreign artists. That may or may not be harmful, but it certainly is a consideration in any decision to extend resale rights to foreign artists.

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[15] *See* Appendix G.

[16] *See* Appendix H.

TABLE V

NATIONALITY OF FOREIGN ARTISTS

(numbers represent 1977 resales only)

nationality	number of artists	percent of artists	value of resales	percent all sales value
Argentine	1	1.2%	$ 1,700	0.1%
Belgian*	3	3.7	13,700	0.4
British	10	12.2	131,800	4.0
Bulgarian	1	1.2	6,000	0.2
Canadian	2	2.4	27,400	0.8
Chilean*	1	1.2	8,000	0.2
Colombian	1	1.2	85,000	2.6
Danish	1	1.2	8,500	0.3
Dutch	1	1.2	18,100	0.5
French*	21	25.6	1,250,200	37.9
German*	5	6.1	43,500	1.3
Greek	1	1.2	2,100	0.1
Israeli	2	2.4	28,900	0.9
Italian*	9	11.0	106,800	3.2
Mexican**	12	14.6	297,550	9.0
Portugese*	1	1.2	15,000	0.5
Russian	3	3.7	9,850	0.3
Spanish	5	6.1	1,230,900	37.3
Swiss	1	1.2	11,500	0.3
unknown	1	1.2	2,000	0.1
totals	82	100.0%	$3,298,550	100.0%***

*nations with some *droit de suite* whether or not enforced

**a special sale of the works of Mexican artists greatly inflated the Mexican totals over previous years

***figures may not total properly because of rounding

The concentration of resales among a few artists is even more pronounced in the sales of foreign artists' works. As Table VI shows, the top five resellers in terms of the number of resales comprise 29.2% of all the resales of foreign artists' works. That compares with 27% for the top five American artists (although because of a tie, seven artists made the American top five). The concentration in terms of the value of resales is far greater. Table VII shows that the top five foreign resellers were responsible for 72.4% of the total value of foreign artists' resales. That compares with 31.4% for living American artists. Moreover, just ten foreign artists (12% of all the foreign artists on the list) were responsible for $2,711,500 in resales or 82% of the foreign total.

TABLE VI

TOP FIVE RESELLERS IN TERMS OF NUMBER OF RESALES

(numbers represent American resales of living and recently dead foreign artists during 1977 only)

artist	number of resales	percent of all resales
Pablo Picasso	14	6.7%
Jean DuBuffet	12	5.7
Francisco Toledo	10	4.8
Marc Chagall	9	4.3
Andre Dunoyer de Segonzac		3.8
Rufino Tamayo	8	3.8
totals	61	29.2%*

*figures may not total properly because of rounding

TABLE VII

TOP FIVE RESELLERS IN TERMS OF DOLLARS OF RESALES

(numbers represent American resales of living and recently dead foreign artists during 1977 only)

artist	value of resales	percent of all resales
Pablo Picasso	$1,145,500	34.7%
Marc Chagall	603,500	18.3
Jean DuBuffet	379,750	11.5

Rufino Tamayo	166,250	5.0
Andre Dunoyer de Segonzac	96,250	2.0
totals	$2,391,250	72.4%

It seems that no matter how one looks at the auction sales, only a few artists have any resales and only the most important artists have significant resale markets. The dealer interviews confirm that is the case generally in the art resale market. Just the descriptions of the resales of each of the dealers interviewed tells a great deal about the size of the resale market. And these interviews were held with what are generally considered the major art resellers in the San Francisco Bay area.

Gallery A specializes in established twentieth century artists, particularly American. The director agreed to review the invoices of sales for February and March of 1978. Most of the sales were of prints. Only three out of perhaps thirty or 35 sales were of original works by living artists for over $1000. One work by Claes Oldenberg and another by Frank Stella had been purchased directly from the artists for resale. The gallery director refused to believe those sales might be covered by a resale right. Only one resale was of a work that had been purchased on the market. It was a piece by Wayne Thiebaud. The director of Gallery A was amazed at the results. "I always thought I was one of, if not the major reseller in the Bay area," he said.

Gallery B handles almost exclusively modern works generally priced between $1000 and $2000. Resales are a significant portion of the gallery's business, yet the gallery apparently resells only a few works by the most important modern artists.

Dealer C does not have a gallery and its sales are almost exclusively resales. Dealer C claimed that only the works of a few of the most important modern artists could be resold profitably in the Bay area.

Gallery D is a large, aggressive gallery. They both sell new works and handle resales. The director of Gallery D checked their records for the past two years and found only one resale of a living artist for over $1000 and that was the work of an Italian artist.

Gallery E specializes in living Bay area artists. Most of their sales are initial sales on behalf of the artist, not resales. Their few resales are either of artists for whom they are an agent on initial sales or a few of the very best known artists whose works can be resold very quickly. Gallery E views their resales primarily as a service to their customers to encourage purchases of new works.

Gallery F is almost entirely involved in resales. However, the resales are almost exclusively prints and a few graphics. The gallery handles very few paintings and nearly no sculpture. The director of the gallery could not think of any recent resales which would qualify under the

California law for a resale right.

Dealer G is a major reseller. But Dealer G emphasized that the majority of the resales were of prints not covered by a resale right like California's which applies only to original works.

Gallery H was recommended by nearly every other gallery as an important art reseller. However, the director stated that the gallery had nearly no resales and acted almost exclusively as a seller for artists' new works.

If any confident conclusion can be drawn from this study, it is that the art resale market is a very limited one. The opponents of the art resale right are correct—most artists have no resale market, a few artists have a small resale market, and only a few of the most successful artists have a significant resale market. Since the benefits of an art resale right go only to those artists with a resale market, the benefits will go primarily to a very few of the most important artists, who usually already have lucrative initial sales.

Effect of the resale right on purchasers. The other side of the benefits an art resale right might confer are the costs it would impose. The art dealers interviewed indicated that at least part of those costs may be passed on to buyers of art in the form of higher prices. The opponents of art resale rights argue that higher prices will cause buyers to buy less art. Economic theory says that when the price of something goes up, people should buy less of it. However, whether that in fact occurs and the extent to which it occurs depend upon several factors, mainly buyers' sensitivity to price.

The auction catalogs give no information about buyers, so they provide no help on this issue. The dealers interviewed, however, were quite candid in expressing their experiences with buyers. Most of the dealers agreed that the people who buy art from them tend to have mixed motives. Most are not buying art purely as an investment; they are buying art because they enjoy art and want to own it. But the buyers also tend to be knowledgable about prices of art, particularly differences in prices between markets. And although they are not buying solely as an investment, the buyers are aware often of the investment possibilities.

However, two dealers disputed the importance of price to buyers. One argued that art prices are so intangible that a 5% resale right does not matter. Moreover, this dealer seemed to think trust was more important than price. Other dealers sell prints identical to those sold by this dealer, but buyers still prefer to deal with someone they trust. Another dealer argued that a 5% resale right like California's is not important to a buyer because of inflation. With inflation running at better than 5%, the cost of the resale right is covered by the inflation in the value of the work in the first year. However, both dealers changed their minds when the resale right became a more significant percentage.

The closest thing to a concensus would be that buyers are at least aware of prices and somewhat sensitive to them. But the dealers divided when asked whether the resale right would actually hurt sales. Four dealers said the resale right would reduce the resales of art subject to it, four said it would not and one answered both yes and no at different points in the interview and ended up uncertain.

The impression left after the interviews was that while price is often not the most important factor in an art buyer's decision to buy, it is at least one factor. A five percent resale right like California's probably would not be enough to forestall a very large percentage of sales. However, it would become important in marginal sales, and the dealers indicated it could encourage buyers to go to other markets which do not have a resale right. While the resale right would probably not destroy the art market, it would probably discourage sales of art subject to it to some extent.

Effect of the resale right on dealers. The art dealers interviewed were clearly against statutory resale rights, although one claimed to have sold a number of works with contractual resale rights and was quite happy to sell that way. The opposition of art dealers to the resale right is understandable. The opponents argue that the resale right will effect dealers in two ways. First, they argue that the costs of the resale right will force marginal dealers out of business. Most of the art dealers did not think the resale right would force them out of business, although several claimed they would stop dealing in works covered by the resale right if they were less profitable. However, one dealer, who reputedly is a financially marginal dealer, did feel the costs of the resale right would destroy the gallery's business. The argument may have some force for financially marginal dealers, at least the dealers seem to think so.

Second, the opponents argue that even if dealers stay in business, the added cost of the resale right reduces their ability to develop young and unknown artists. The costs of showing the works of a young or unknown artist often exceed the income from a show. Since new shows are often placed in the front portion of a gallery, they are typically called "frontroom" sales. One dealer provided the income and costs of a recent show to illustrate the problem. Those figures are summarized in Table VIII. The show produced income of only $4,493 while the gallery incurred direct costs of $6,173 for a direct loss of $1,680. On top of the direct costs, the gallery had fixed costs such as staff, rent and utilities. The loss on such showings must be made up elsewhere. Several gallery dealers claimed that the "backroom" resales of established artists' works subsidized a significant portion of losses on new artist's works. If dealers must bear part of the cost of a resale right, their loss of profits would reduce the subsidies which they can provide to develop young and unknown artists.

TABLE VIII

INCOME AND DIRECT COSTS FOR A NEW ARTIST SHOWING

(an example provided from the books of one gallery)

Income		$4,493.00
(sales of works in the show during the show)		
Costs		
catalog	$3,324.66	
advertisements in art journals	2,235.00	
local advertising	260.68	
food and liquor for opening	744.43	
mailing costs	251.25	
freight	1,161.10	
special services	2,044.55	
total	$10,021.67	
less: expenses shared by others	3,848.82	6,172.85
gain (loss)		$(1,679.85)

The dealers generally agreed that the resale right would reduce the backroom-frontroom sales subsidy. Gallery F has no showings of young or unknown artists; it deals exclusively in resales of established artists' works. If resales do subsidize showings, it would follow that Gallery F should be making far more than other galleries. Gallery F's director answered that question with a very broad, self-satisfied smile.

However, both Gallery E and Gallery H specialize in showings of artists' new works. Neither has significant resales to subsidize those showings. One would think both galleries would be completely insolvent. The reason they are not insolvent is probably that resales of established artists are not the only factors subsidizing losses on some shows of young and unknown artists. Both Gallery E and Gallery H represent some established artists on initial sales and are probably able to use profits on those sales to offset any losses on more speculative artists.

There appears to be some validity to the argument that the art resale right would interfere with the backroom-frontroom sales subsidy. However, the loss of profits caused by a resale right might be made up by subsidies from other activities of the gallery.

CONCLUSION

Both sides of the argument over art resale rights have made assumptions about the art market without properly researching the basis for those assumptions. The conclusions of this study are that those assumptions have not been entirely valid. First, the problem the proponents see with artists selling works for low prices before they become famous, while it occurs, is probably not as significant as it sometimes is made out to be. Cases like the Rauschenberg-Scull affair may be useful as examples for argument, but they do not appear to be typical occurrences in the art market.

Second, the opponents of the art resale right appear to be quite correct that very few artists have any resale market and that those artists with a significant resale market tend to be the more successful artists. Most of the benefits of an art resale right would probably go to a few of the most important artists.

Third, the opponents may have exaggerated the concern over buyers not buying works subject to the resale right because resale rights raise art prices. Buyers do not seem highly sensitive to price. However, the opponents are probably correct that the resale right will discourage at least some buyers and might encourage buyers to go to markets which do not have a resale right.

Finally, the opponents seem to be correct to some extent that if the costs of the resale right fall upon art dealers, some marginal dealers may go out of business and those that stay in business may not be as able to subsidize the promotion of young and unknown artists.

The art resale right seems to benefit only a few artists and entails risks of harming the art market. Whether legislatures are still justified in enacting art resale rights is a matter of policy and philosophy beyond the scope of this study. Nonetheless, this study shows that much of the argument has been based on unsound assumptions about the art market. It is important as the debate over art resale rights continues that people respond not just to the frustration and indignation of the artists like Robert Rauschenberg who have seen their works resold at fabulously appreciated prices, but also to the reality of the art resale market.

APPENDIX A

SOTHEBY PARKE BERNET AUCTION CATALOGS RECORDED

1973 Sales

#3557
3558 (the Scull auction)
3559

1974 Sales

#3617
3630
3632
3633
3634
3652
3681
3682
3683
3684

1975 Sales

#3761
3762
3763
3775
3796
3796A
3796B
3797
3789

1976 Sales

#3848
3880
3881
3882
3883
3907
3908
3909
3910
3935

1977 Sales

#3964
3986
3987
3988
3989
3997 (Mexican art)
4003
4030A
4030B
4031
4032
4033
4064

APPENDIX B

FORM FOR RECORDING AUCTION RESALES

sale	price ________ est. ________ year _____ rel.year _____ city ____________ catalog ______________ work# _____
artist	name ___________ birth _______ death _____ nation _____
work	title ______________________________________ medium ____________________ year _____ rel.year _____ copyright _____________ prior owner _____________

"price"—price at which the lot was sold; only lots actually sold at the auction were recorded

"est."—estimated prices for resales are provided by Sotheby Parke Bernet, Inc.; these were recorded for a number of the auctions, but since they established no useful trends, this item was abandoned

"year"—the year in which the auction sale occurred

"rel. year"—the year in which the auction occurred in relation to the life of the artist; for living artists it represents the age of the artist at the time of the auction, for dead artists, the number of years after the artist's death that the sale occurred

"name"—name of the artist, or if necessary, artists, who created the work sold

"birth"—birth year of the artist

"death"—year of death of the artist

"nation"—nationality of the artist as listed by Sotheby Parke Bernet, Inc. in the catalog

"title"—name or description of the work sold

"medium"—medium of the work of art, generally painting, drawing or sculpture

"year"—year in which the work was created

"rel. year"—year in which the work was created in terms of the artist's

age; the artist's age when the work was created
"copyright"—any information on copyright of the work was noted
"prior owner"—in some cases, Sotheby Parke Bernet, Inc. auction catalogs list the consignor for sale; however, the prior owner was listed so few times that no valuable results were found

APPENDIX C

NOTES USED BY INTERVIEWER DURING INTERVIEWS TO GUIDE QUESTIONS

PURPOSE: To test hypotheses of the proponents and opponents of art resale legislation such as Cal. Civil Code § 986 (Sieroty bill).

WHAT WANT FROM YOU: Only people involved in it have the information to test the claims. Want your opinions and your help in trying to substantiate several issues.

WARNING: Involves confidential or private information; makes me a bit uncomfortable. Hope you will guide me.

QUESTIONS:

1. *Background on gallery*—limitations or specialties
2. *Place of secondary sales in gallery*—is there a subsidizing effect between primary and secondary?
3. *Persons who buy and sell*—who are they and why do they? How long and how often are works resold?
4. *About artists*—MOST IMPORTANT!!!!! *give hypothetical statute*
    (a) how many (what percent) of your resales would fall within the terms?
    (b) how many artists would be involved?
    (c) who are they?
    (d) estimate magnitude of benefits would receive?

AID: Guidance in how to go about this. Other galleries and dealers should see?

APPENDIX D

Age of Artists When Works Created and When Resold

The following list is compiled from the Sotheby Parke Bernet, Inc. auction catalogs for 1977. It represents the resales of living American artists only. The first column gives the name of the artist. The second column the price at which their works were resold. The third column lists the age of the artist during the year of the sale. And the fourth column lists the age of the artist during the year in which the work sold was created. If a work was created in more than one year, the last year listed was considered the year of creation.

ARTIST	SALE PRICE	AGE AT SALE	AGE WHEN WORK MADE
Anuskiewicz, Richard	$ 2,800	47	36
Baradazzi, Peter	1,000	34	29
Blackwell, Tom	5,500	39	33
Caesar, Doris	3,500	84	69
Christo	4,000	42	36
Daphnis, Nassos	800	63	—
D'Arcangelo, Allan	1,900	47	38
	10,250	47	33
Davis, Gene	2,600	57	45
Davis, Ron	800	40	36
DeKooning, Willem	10,000	73	72
	13,000	73	64
	2,600	73	61
	10,000	73	33
	4,500	73	33
DeLap, Tony	1,500	50	38
De Rivera, Jose	13,000	73	63
	13,500	73	53
Dine, Jim	16,500	42	28
Dzubas, Friedel	8,000	62	57
Estes, Richard	16,000	41	33
Flavin, Dan	6,000	44	38
Francis, Sam	10,500	54	50
Goode, Joe	650	40	36
Goodnough, Robert	5,250	60	53
Held, Al	13,000	49	46

Huntington, Jim	1,500	49	39
Indiana, Robert	11,000	49	45
	1,900	49	42
Jenkins, Paul	4,100	54	48
	650	54	37
	1,000	54	39
Johns, Jasper	20,000	47	43
Johnson, Ray	600	50	42
	750	50	41
Kacere, John	3,750	57	52
Kelly, Ellsworth	42,500	54	41
Krushenick, Nicholas	3,000	48	44
Leete, William	550	48	37
Levinson, Mon	700	51	39
Lewitt, Sol	6,750	49	41
Lichtenstein, Roy	25,000	54	47
	52,500	54	44
	22,000	54	41
	11,000	54	41
	1,100	54	41
Lindner, Richard	10,000	76	66
	750	76	45
Lund, David	1,200	52	33
Marca-Relli, Conrad	4,500	64	—
Marden, Brice	800	39	36
Martin, Agnes	42,500	65	52
Merkin, Richard	800	39	27
Mitchell, Joan	7,500	51	36
Motherwell, Robert	7,500	62	57
	19,000	62	56
	600	62	39
Movitz, Edward	750	48	37
Nauman, Bruce	4,000	36	32
Newman, Barnett	17,000	62	31
Nevelson, Louise	10,000	77	64
Noguchi, Isamu	5,000	73	63
Noland, Kenneth	16,000	53	49
	22,500	53	40
	22,000	53	38
Okada, Kenzo	11,000	75	66
Oldenburg, Claes	37,500	48	33
Olitski, Jules	12,000	48	44

	12,000	48	43
	6,500	48	43
	3,250	48	43
Parker, Ray	3,500	55	38
Poons, Larry	5,250	40	37
	8,000	40	36
	4,000	40	33
Rauschenberg, Robert	7,500	52	48
	7,250	52	43
	90,000	52	39
Rivers, Larry	6,500	54	41
	27,500	54	40
	15,000	54	39
	2,400	54	39
Rosenquist, James	1,500	44	34
Salemme, Attilio	3,000	58	25
Samaras, Lucas	900	41	24
Sander, Ludwig	500	71	55
Scholder, Fritz	1,300	40	—
Serra, Richard	4,500	38	33
Snelson, Kenneth	8,000	50	40
Stamos, Theodores	1,100	55	49
Steinberg, Saul	4,250	63	—
	14,000	63	56
	3,500	63	54
	2,400	63	52
Stella, Frank	13,000	54	51
	7,750	54	49
Still, Clyfford	165,000	73	50
	80,000	73	46
Thiebaud, Wayne	7,500	57	53
Tobey, Mark	6,500	87	70
Trova, Ernest	4,250	48	34
	4,000	48	34
Twombly, Cy	22,000	49	42
	3,500	49	37
	5,000	49	36
Tworkov, Jack	6,500	77	72
Warhol, Andy	1,000	47	—
	6,000	47	34
Wesselmann, Tom	4,500	46	46
	1,700	46	43
	3,000	46	41

	13,000	46	40
	800	46	36
	850	46	32
	800	46	32
	25,000	46	30
	1,700	46	—
Wiley, William	900	47	32
Youngerman, Jack	650	51	45

APPENDIX E

RESALE FOR OVER $1000 OF WORKS OF LIVING AMERICAN ARTISTS

The following list is compiled from the Sotheby Parke Bernet, Inc. auction catalogs from October of 1973 through the end of 1977. It represents a summary of the resales of works of living American artists during that period for over $1000. The first column lists the name of the artist. The second column lists the number of lots resold at auction for each artist over the entire four years. The third column lists the total value of each artist's sales over the four years. The fourth column divides the number in the third column by the number in the first column to determine the average sale price for each artist's works over the four years.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Albers, Josef (died in 1976)	12	$283,850	$23,654
Anthony, Carol	1	2,000	2,000
Anuskiewicz, Richard	5	15,200	3,040
Artschwager, Richard	2	4,800	2,400
Avedisian, Edward	1	1,100	1,100
Bannard, Walter Darby	5	12,500	2,500
Baradazzi, Peter	1	1,000	1,000
Baziotes, William	2	9,550	4,775
Bearden, Romare	2	3,000	1,500
Bell, Larry	2	16,000	8,000
Benton, Thomas Hart	4	6,200	1,550
Blackwell, Tom	1	5,500	5,500
Bogoshian, Varujan	1	1,000	1,000
Bontecou, Lee	3	15,000	5,000
Boxer, Stanley	1	1,000	1,000
Bradley, Peter	1	1,000	1,000
Brooks, James	1	1,000	1,000
Brumbach, Louise Upton	1	2,200	2,200
Caesar, Doris	1	3,500	3,500
Calder, Alexander (died in 1976)	57	495,750	8,697
Callery, Mary	2	2,400	1,200
Capp, Al	2	16,500	8,250
Chamberlain, John	4	25,500	6,375

Christensen, Dan	10	34,950	3,495
Christo (naturalized during study period)	1	4,000	4,000
Clarke, John Clem	6	12,200	2,033
Conner, Bruce	1	2,500	2,500
Cottingham, Robert	2	34,500	17,250
D'Arcangelo, Allan	3	17,150	5,717
Davis, Gene	2	8,850	4,425
Davis, Ron	4	24,400	6,100
De Kooning, Willem	28	574,950	20,534
DeLap, Tony	1	1,500	1,500
DeMaria, Walter	1	21,000	21,000
De Rivera, Jose	3	41,500	13,834
De Saint-Phalle, Niki	1	3,000	3,000
Diao, David	1	1,000	1,000
Diebenkorn, Richard	1	2,500	2,500
Dine, Jim	9	90,100	10,011
DiSuvero, Mark	2	23,100	11,550
Downing, Thomas	1	1,500	1,500
Dzubas, Friedel	3	10,550	3,517
Estes, Richard	7	104,200	14,886
Feeley, Paul	1	2,200	2,200
Ferber, Herbert	1	3,600	3,600
Flavin, Dan	3	19,500	6,500
Francis, Sam	12	138,600	11,550
Frankenthaler, Helen	6	69,600	11,600
Gabo, Naum	2	129,000	64,500
Goings, Ralph	3	26,700	8,900
Goldberg, Michael	1	3,100	3,100
Goodnough, Robert	1	5,250	5,250
Gottlieb, Adolph (died 1974)	7	33,600	4,800
Graham, John	1	4,250	4,250
Graves, Morris	1	1,300	1,300
Grooms, Red	½	3,250	3,250
Gross, Mimi (joint work)	½	3,250	3,250
Gross, Chaim	2	8,500	4,250
Grossman, Nancy	1	2,000	2,000
Guston, Philip	5	52,300	10,460
Hains, Raymond	1	1,200	1,200
Hanson, Duane	2	45,000	22,500
Held, Al	2	14,500	7,250

Holland, Tom	1	2,250	2,250
Humphrey, Ralph	2	2,300	1,150
Huntington, Jim	1	1,500	1,500
Indiana, Robert	6	71,900	11,983
Jansem, Jean	1	1,500	1,500
Jenkins, Paul	16	53,100	3,319
Johns, Jasper	4	404,000	101,000
Judd, Donald	4	14,800	3,700
Kacere, John	1	3,750	3,750
Katz, Alex	3	8,200	2,733
Kelly, Ellsworth	8	195,500	24,438
Kingman, Dong	1	1,600	1,600
Kleeman, Ron	1	1,200	1,200
Krasner, Lee	1	3,000	3,000
Krushenick, Nicholas	4	10,500	2,625
Lawrence, Jacob	1	2,100	2,100
Leslie, Alfred	1	2,000	2,000
Lewitt, Sol	2	11,000	5,500
Liberman, Alexander	1	1,500	1,500
Lichtenstein, Roy	11	330,100	30,009
Lindner, Richard	10	209,900	20,990
Lipsky, Paul	1	1,200	1,200
Lund, David	1	1,200	1,200
Man Ray (died in 1976)	4	24,600	6,150
Marca-Relli, Conrad	2	12,000	6,000
Martin, Agnes	3	48,800	16,267
Menkes, Sigmund	1	2,000	2,000
Mitchell, Joan	4	19,800	4,950
Morris, Robert	3	27,100	9,033
Moses, Ed	1	1,350	1,350
Motherwell, Robert	16	152,750	12,729
Muller, Robert	1	5,500	5,500
Natkin, Robert	1	4,800	4,800
Nauman, Bruce	2	10,000	5,000
Nesbitt, Lowell	6	16,600	2,767
Nevelson, Louise	11	88,850	8,077
Noguchi, Isamu	5	70,000	14,000
Noland, Kenneth	19	285,300	15,016
Okada, Kenzo	1	11,000	11,000
Oldenburg, Claes	17	158,350	9,315
Olitski, Jules	19	179,850	9,466
Ossorio, Alfonso	1	4,000	4,000
Paris, Harold	1	1,500	1,500

Parker, Ray	1	3,500	3,500
Pearlstein, Philip	1	1,000	1,000
Pettet, William	1	1,600	1,600
Poons, Larry	12	107,100	8,925
Posen, Stephen	2	36,000	18,000
Pousette-Dart, Richard	2	12,400	6,200
Raffaele, Joseph	1	2,000	2,000
Ramos, Mel	2	4,600	2,300
Rattner, Abraham	2	5,500	2,750
Rauschenberg, Robert	12	608,250	50,688
Rickey, George	4	15,850	3,962
Rivers, Larry	28	276,000	9,857
Rosenquist, James	9	126,900	14,100
Ruscha, Ed	13	50,000	3,846
Salemme, Attilio	1	3,000	3,000
Samaras, Lucas	8	56,950	7,119
Sander, Ludwig	1	3,400	3,400
Santamaso, Guiseppe	1	1,800	1,800
Scholder, Fritz	1	1,300	1,300
Seery, John	2	3,050	1,525
Segal, George	3	28,100	9,367
Seligman, Kurt	1	1,400	1,400
Serra, Richard	3	14,500	4,833
Shahn, Ben	4	14,500	3,625
Snelson, Kenneth	1	8,000	8,000
Sonnier, Keith	2	3,500	1,750
Soyer, Moses	1	3,400	3,400
Soyer, Raphael	5	13,550	2,710
Staiger, Paul	1	2,600	2,600
Stamos, Theodores	4	6,000	1,500
Stanczak, Julian	1	2,000	2,000
Stanley, Bob	4	5,100	1,275
Steinberg, Saul	9	42,600	4,733
Stella, Frank	19	365,400	19,232
Still, Clyfford	2	245,000	122,500
Tanning, Dorothea	1	6,000	6,000
Thiebaud, Wayne	2	10,300	5,150
Tobey, Mark	17	102,700	6,041
Trova, Ernest	8	36,750	4,594
Twombly, Cy	11	122,500	11,136
Tworkov, Jack	3	17,600	5,867
Warhol, Andy	18	294,250	16,347
Wesselmann, Tom	23	153,050	6,654

Westermann, H.C.	1	6,000	6,000
Young, Peter	3	21,000	7,000
Zox, Larry	2	2,300	1,150
TOTALS	705	$7,812,250	

APPENDIX F

RESALES FOR BETWEEN $500-$1000 OF WORKS OF LIVING AMERICAN ARTISTS

The following list is identical to the list in Appendix E, except that it is compiled for sales between $500 and $1000.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Anuskiewicz, Richard	1	$ 950	$ 950
Artschwager, Richard	1	600	600
Avedisian, Edward	3	2,050	683
Bannard, Walter Darby	2	1,450	725
Baskin, Leonard	1	550	550
Bearden, Romare	1	950	950
Benton, Thomas Hart	2	1,350	675
Bertoia, Harry	1	800	800
Bisttram, Emil	1	550	550
Bohrod, Aaron	1	700	700
Brach, Paul	1	800	800
Bradley, Peter	1	750	750
Callery, Mary	1	900	900
Chamberlain, John	1	650	650
Christensen, Dan	1	600	600
Chryssa	1	650	650
Clarke, John Clem	1	500	500
Copley, William	1	500	500
Daphnis, Nassos	1	800	800
Davis, Ron	4	3,250	812
De St. Phalle, Niki	2	1,400	700
Diebenkorn, Richard	2	1,150	575
Dill, Guy	1	950	950
Dodeigne, Eugene	1	600	600
Dzubas, Friedel	1	900	900
Evergood, Phillip	1	800	800
Gatch, Lee	1	750	750
Giobbi, Edward	1	900	900
Goode, Joe	1	650	650
Graves, Morris	2	1,750	875
Guston, Phillip	2	1,500	750

Held, Al	1	850	850
Hinman, Charles	1	850	850
Humphrey, Ralph	1	650	650
Israel, Marvin	3	1,775	592
Jenkins, Paul	2	1,250	625
Johnson, Ben	2	1,650	825
Johnson, Lester	1	900	900
Johnson, Ray	4	2,350	588
Katz, Alex	2	1,550	775
Kauffman, Craig	1	800	800
Kinigstein, Jonah	1	550	550
Koch, John	1	850	850
Krushenick, Nicholas	1	700	700
Leete, William	1	550	550
Leslie, Alfred	1	500	500
Levine, Jack	1	900	900
Levine, Les	1	950	950
Levinson, Mon	1	700	700
Lewitt, Sol	2	1,575	788
Liberman, Alexander	2	1,700	850
Lindner, Richard	1	750	750
Marca-Relli, Conrad	1	850	850
Marden, Brice	1	800	800
McCracken, John	2	1,350	675
Merkin, Richard	1	800	800
Motherwell, Robert	1	600	600
Movitz, Edward	1	750	750
Nutt, Jim	1	750	750
Ossorio, Alfonso	1	800	800
Owen, Frank	1	800	800
Pearlstein, Philip	3	1,850	617
Pereira, Irene Rice	1	800	800
Pettet, William	1	950	950
Prestopinio, Gregorio	1	650	650
Reiback, Earl	1	950	950
Resnick, Milton	1	675	675
Rivers, Larry	3	2,200	733
Ruscha, Ed	3	2,600	867
Samaras, Lucas	2	1,850	925
Sander, Ludwig	2	1,200	600
Segal, George	1	600	600
Self, Colin	2	1,050	525
Shapiro, Joel	1	750	750

Sloane, Eric	2	1,250	625
Sonnier, Keith	1	500	500
Soyer, Raphael	1	600	600
Stamos, Theodoros	2	1,050	525
von Wiegand, Charmion	1	550	550
Warhol, Andy	7	5,000	714
Wesselmann, Tom	3	2,450	817
Wiley, William T.	2	1,400	700
Young, Peter	1	700	700
Youngerman, Jack	1	650	650
Zox, Larry	2	1,650	825
TOTALS	128	$ 92,475	

APPENDIX G

RESALES FOR OVER $1000 OF WORKS OF RECENTLY DECEASED AMERICAN ARTISTS

The following list is identical to the list in Appendix E, except that it is compiled for resales over $1000 of the works of artists who had died within five years of the resale of one of their works.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Albers, Josef (died in 1976 at the age of 88)	6	$ 93,500	$15,583
Calder, Alexander (died in 1976 at the age of 78)	12	106,650	8,888
Cornell, Joseph (died in 1973 at the age of 70)	14	206,150	14,725
Gottlieb, Adolph (died in 1974 at the age of 71)	6	29,600	4,933
Knaths, Karl (died in 1971 at the age of 80)	1	1,900	1,900
Lipchitz, Jacques (died in 1973 at the age of 82)	11	115,450	10,495
MacDonald-Wright, Stanton (died in 1973 at the age of 83)	1	1,050	1,050
Man Ray (died in 1976 at the age of 86)	1	2,000	2,000
Newman, Barnett (died in 1970 at the age of 55)	4	407,000	101,750
Rothko, Mark (died in 1970 at the age of 67)	1	110,000	110,000
Smithson, Robert (died in 1974 at the age of 36)	1	13,500	13,500
TOTALS	58	$1,086,800	

APPENDIX H

RESALES FOR OVER $1000 OF WORKS OF FOREIGN ARTISTS

The following list is identical to the list in Appendix E, except that it is compiled for resales over $1000 of the works of foreign artists who were living at the time of the sale or had died within five years prior to the sale. This list is limited to resales during 1977.

ARTIST	NUMBER OF SALES	TOTAL VALUE OF SALES	AVERAGE SALE PRICE
Afro (Basadella) (Italian)	2	$ 10,000	$ 5,000
Agam, Yaacov (Israeli)	3	14,300	4,767
Alechinsky, Pierre (Belgian)	1	2,100	2,100
Appel, Karel (Dutch)	3	18,100	6,033
Arman (French)	2	13,000	6,500
Baj, Enrico (Italian)	1	2,200	2,200
Bauermeister, Mary (German)	1	2,500	2,500
Bazain, Jean (French)	1	12,000	12,000
Bolotowsky, Ilya (Russian)	1	1,600	1,600
Botero, Fernando (Colombian)	4	85,000	21,250
Brayer, Yves (French)	1	1,200	1,200
Buffet, Bernard (French)	4	21,200	5,300
Bury, Pol (Belgian)	1	2,100	2,100
Caffee, Nino (Italian)	2	5,000	2,500
Carrington, Leonora (British-Mexican)	4	8,750	2,188
Chadwick, Lynn (British)	1	2,000	2,000
Chagall, Marc (Russian-French)	9	603,500	67,056
Charlot, Jean (French-Mexican)	1	2,800	2,800
Chavez Morado, Jose (Mexican)	1	2,000	2,000
Christo (Bulgarian) (naturalized as American during the sample period)	1	6,000	6,000

Cortes, Edouard (French)	1	1,100	1,100
Corneille (Van Beverloo) (French)	1	16,500	16,500
Cruz-Diez, Carlos (Italian)	1	4,100	4,100
Cuevas, Jose Luis (Mexican)	1	2,500	2,500
Dali, Salvadore (Spanish)	5	21,500	4,300
Da Silva, Maria Elena Viera (Portugese)	1	15,000	15,000
Davie, Alan (British)	1	2,000	2,000
De Chirico, Giorgio (Italian)	1	7,500	7,500
Delaunay-Terk, Sonia (Russian)	1	4,750	4,750
Delvaux, Paul (Belgian)	2	9,500	4,750
DuBuffet, Jean (French)	12	379,750	31,646
Eisendieck, Suzanne (German)	1	1,300	1,300
Etrog, Sorel (Canadian)	1	2,250	2,250
Gerzso, Guenther (Mexican)	2	4,300	2,150
Hajdu, Etienne (French)	1	2,500	2,500
Hambourg, Andre (French)	1	1,600	1,600
Hockney, David (British)	1	2,250	2,250
Jansem, Jean (American-French)	1	1,100	1,100
Jiminez, El (not available)	1	2,000	2,000
Jorn, Asger (Danish)	1	8,500	8,500
Lapicque, Charles (French)	1	1,400	1,400
Le Parc, Julio (Argentine)	1	1,700	1,700
Lorjou, Bernard (French)	3	4,600	1,533
Manessier, Alfred (French)	4	16,600	4,150
Manzu, Giacomo (Italian)	2	63,000	31,500
Marcks, Gerhard (German)	2	5,500	2,750
Marini, Marino (Italian)	2	8,200	4,100
Masson, Andre (French)	4	49,600	12,400
Matta (R. Echaurren) (Chilean)	3	8,000	2,667
Meadows, Bernard (British)	1	1,600	1,600
Merida, Carlos (Mexican)	2	17,500	8,750
Meza, Guillermo (Mexican)	2	2,100	1,050
Minaux, Andre (French)	1	1,100	1,100
Mirko (Balsadella) (Italian)	1	1,100	1,100
Miro, Jean (Spanish)	2	55,000	27,500

Moore, Henry (British)	7	66,000	9,429
Music, Antonio (Italian)	2	5,700	2,850
Nicholson, Ben (British)	3	51,250	17,083
Oudot, Roland (French)	2	2,600	1,300
Pignon, Edouard (French)	3	5,600	1,867
Pissarro, Paulemile (French)	1	1,000	1,000
Riopelle, Jean (Canadian)	4	25,150	6,288
Saura, Antonio (Spanish)	1	1,100	1,100
Schmidt-Rottluff, Karl (German)	1	9,000	9,000
Soudeikine, Sergei (Russian)	1	3,500	3,500
Soulages, Pierre (French)	3	17,000	5,667
Sutherland, Graham (British)	1	1,900	1,900
Takis, Vassilakis (Greek)	1	2,100	2,100
Tamayo, Rufino (Mexican)	8	166,250	20,781
Tinguely, Jean (Swiss)	2	11,500	5,750
Toledo, Francisco (Mexican)	10	15,600	1,560
Turnbull, William (British)	1	1,200	1,200
Zuniga, Francisco (Mexican)	6	22,200	3,700

FOREIGN ARTISTS DECEASED WITHIN THE LAST FIVE YEARS

Berman, Eugen (Russian-French) died in 1974 at the age of 75)	2	2,100	1,050
Carrillo, Lilia (Mexican) (died in 1974 at the age of 44)	1	4,250	4,250
Dunoyer de Segonzac, Andre (French) (died in 1974 at the age of 90)	8	96,250	12,031
Ernst, Max (German) (died in 1976 at the age of 85)	3	25,250	8,417
Grau-Sala, Emilio (Spanish) (died in 1975 at the age of 64)	2	7,800	3,900
Hepworth, Barbara (British) (died in 1975 at the age of 72)	1	2,500	2,500
Picasso, Pablo (Spanish) (died in 1973 at the age of 92)	14	1,145,500	81,821
Rubin, Reuven (Israeli) (died in 1974 at the age of 81)	2	14,600	7,300
Siqueiros, David Alfaro (Mexican) (died in 1974 at the age of 76)	7	49,300	7,043
TOTALS			
living foreign artists	169	$1,951,000	
dead foreign artists	40	1,347,550	
TOTAL	209	$3,298,550	

Mr. MERRYMAN. Most of the organizations I heard you list—I didn't hear all of them—are interested organizations on behalf of artists who favor the right: Artists Equity and so forth—Bay Area Lawyers for the Arts, which Lenny DuBoff talked about just a moment ago, is another organization that is a kind of lawyers' affiliate of Artists Equity—those organizations are largely artist-oriented.

Senator KENNEDY. Well, is there something wrong with that?

Mr. MERRYMAN. No, it isn't.

Senator KENNEDY. Well, they are a reasonably significant and important part of——

Mr. MERRYMAN. They are significant in a lot of highly important ways. They are highly respectable organizations, and I wouldn't want in any way to indicate that I detract from them, but they have not been——

Senator KENNEDY. You don't mean that they don't have interests or that those interests are unimportant to you?

Mr. MERRYMAN. No, they have important interests, but what I am suggesting is that they have not taken a disinterested view of the resale proceeds right.

Senator KENNEDY. Excuse me. I just missed the last part of that.

Mr. MERRYMAN. I'm sorry. I just said they have not taken a disinterested view of the resale proceeds right. They have not——

Senator KENNEDY. No, no. That's right.

Mr. MERRYMAN. They have not looked at it in the way that the studies I mentioned in my written presentation to you have. Those are disinterested studies by persons who have no stake as artists, as dealers, as collectors, as museum personnel, in the art world. They are approaching it simply with a view to trying to understand how it would work, and their conclusion is as I have stated it in my written submission.

Senator KENNEDY. Well, you are not suggesting that those that are opposed to this, for example, the gallery dealers and others, are not taking a look at the financial considerations, are you?

Mr. MERRYMAN. No. No, I don't.

Senator KENNEDY. Well, you are not suggesting, then, that the artists are being less honorable by taking a look at their financial interest, are you?

Mr. MERRYMAN. No, no. What I am saying is that they are being less critical.

Senator KENNEDY. They are being what?

Mr. MERRYMAN. Less critical. This is a very congenial kind of proposal from the point of view of artists. I think it is misguided of artists to think it is congenial, because for most artists it will work to their disadvantage, but most artists perceive it as something that works to their advantage. It is a congenial idea to them, and of course they support what appears to them to be congenial. That is perfectly reasonable.

Senator KENNEDY. Well, is it less obvious that the galleries would oppose it because they feel that their financial interests are going to be threatened?

Mr. MERRYMAN. Not at all; equally obvious.

Senator KENNEDY. So, therefore, it's back in our court. Is that what you are trying to say—that you have a group of galleries that feel financially threatened and your testimony states that artists sense an opportunity to take advantage of increases in the value of their work? That is not my conclusion because I think we heard testimony from our earlier panel that talked about recognition that is earned, as well as the financial compensation; and I thought it was a rather well-stated and reasonably obvious point.

Mr. MERRYMAN. May I comment on that?

Senator KENNEDY. Yes.

Mr. MERRYMAN. I think it would be highly desirable for the committee to pursue ways of recognizing artists, including the work and the reputations and the careers of the great majority of artists who do not achieve market success or critical success, but who produce worthy, quality work and whose occupation is a worthy, honorable occupation. This resale proceeds right will do nothing for those artists.

Senator KENNEDY. I don't think that——

Mr. MERRYMAN. One of the things, one of the proposals I would suggest, Senator, is that if there is a desire to impose a 7-percent or any other percent royalty on resales, that the proceeds go into a fund which could be used to aid unsuccessful artists with their health problems, with other kinds of problems, not simply go into a small additional supplement to the incomes of already successful, wealthier artists.

Senator KENNEDY. I personally don't think that providing some participation in the increased value of a work to an artist is inconsistent with creating appropriate recognition and rewards for other artists whose art may be less recognized. I think it is important to talk about how we can deal with the various needs of artists within a full range of programs. I yield to no one in that concern.

If you have some ideas, particularly from those representing the galleries and the collectors, that they will go out and support, I would be enormously interested in listening and working with you or any other representatives. Although BMI and the various composers and creative artists in song have worked out a unique process that both gives compensation to the particular artists as well as gives support and education to other creative artists, it is an interesting and unique arrangement, but we would be interested in hearing specific and realistic proposals from you.

Let me just ask you finally, according to statistics sent in to us from Germany, approximately $700,000 in royalties were paid out last year to the artists. It seems to be working in that country. I don't know whether you have any comment on that.

Mr. MERRYMAN. My understanding of the situation in Germany is the following: that perhaps 10 years ago an agreement was made between the professional organization of German art dealers and the professional organization of German artists, by which the German art dealers agreed to pay a flat percentage of all their sales of contemporary art to the German professional artists organization for distribution among German artists. That is, of course, the kind of arrangement that could only be achieved and could only work in a nation like Germany, where this sort of professional organization and this sort of regimentation of dealers on the one side and artists on the other could work.

Even there, what they are not doing is enforcing the German resale proceeds right law as enacted. With the consent of the Government, they simply entered into a contract between the two organizations to deal with it in this alternative way. And, of course, private sales are exempted totally from the German scheme.

Senator KENNEDY. Well, we have an interesting report here that I am not sure would agree with that completely, but I don't want to take up the time of the committee now to get into that.

Mr. Hopkins, do you feel that a moral rights concept can be developed that would satisfy the legitimate concerns of the museums?

Mr. HOPKINS. Yes, I think, in general, that is correct. I think the issue is not one of a belief in moral rights among museum people, especially conservators and other members of the staff, but I think that the issue is language. How do we define these things in terms so that one, when confronted with an injustice, knows it is an injustice in the black and white.

I think, in general, the support for the ideas which you espouse in this bill would find broad support in the art community. It simply is a question of how is it stated and how is it done. I think you are getting much closer than the California law, and I think that my main reason for appearing here today is that I was opposed to the California law, at least the resale royalty portion of that law and the way that they handled it.

I think this national bill overrides that. I think a lot of the other issues that John Merryman raises, in fact, even in the resale royalty section, are overridden by making this a national law rather than a State law. It becomes immediately more enforceable, more identifiable. I am wandering beyond my point but I wanted to make it in response to John, anyway.

There is a key issue here, and I think that both Robert Mangold and Ms. Holzer recorded that. The issue to a certain extent is fiscal remuneration but well beyond that, the simple recognition that the opportunity exists for an artist to participate in resale opportunities is important. In California the law is left to the artist himself to uphold, and I am not even sure there are penalties. I don't think there are penalties if in fact somebody doesn't give an artist the money, but the point is that it keeps the artist in touch with his work of art. It keeps the artist as part of the art product.

We have wandered too far astray in this country in the last 20 years to the merchandising of art, and too much, and too little dealing with the actual artist and the creative act. I think if this bill does nothing else, if no money ever changes hands, it makes the point that the artist is an important figure in the art world.

Senator KENNEDY. Well, that is an excellent comment.

Mr. DuBoff, let me ask you, if this royalty were enacted, about the tension that it will create between the artist and the dealer. Much has been made about the importance of the dealer in the relationship. It is a unique relationship which no one questions. A dealer has unique and special ways of marketing the products of various artists. There are those that say that resale royalties will affect that relationship in a significant—and negative—way and that impact is something that ought to be measured, and further that because this relationship is so unique we really shouldn't tamper with it. What can you tell us? What is your reaction?

Mr. DuBoff. Mr. Chairman, I doubt that the resale royalty provision would actually affect that relationship. Indeed, if legislation would affect the delicate balance between artists and dealers, then the artist/gallery consignment laws which exist in some 20 States now would actually go further in affecting that delicate balance. That sets up a fiduciary duty between artists and dealers. It imposes some obligations on dealers, and it would appear on the face of it at least to polarize the two groups. In point of fact it has not.

I also don't see how a resale royalty provision would polarize the arts community between dealers and artists. I see it in fact functioning in the same way as any other legislation, imposing an obligation on the seller—not the dealer—to pay the resale royalty to the artist. Dealers are arguing against the bill because they feel that it might somehow chill their sales. In point of fact, the imposition of a tax, there is no empirical evidence to support that it would have a chilling effect. When the auction houses imposed a buyer's premium on their sales, the instances of selling did not decline. We have not seen a retreat from that buyer's premium. We have not seen them change that practice. Indeed, if anything, the practice has expanded. We have not seen the imposition of a buying premium chill that market.

Mr. Chairman, I would like to——

Senator Kennedy. Can we just finish the point on the 10-percent premium instituted in 1974. I gather from your testimony that you don't feel that the imposition of a buyer's premium inhibited the art market.

Mr. DuBoff. No. In fact, if it had inhibited the market we would have seen a retraction of it. Instead of a retraction, we see more and more auction houses expanding and adopting the concept, so I would be very surprised if it actually had a chilling effect on the market.

Mr. Chairman, I would like to make one other point.

Senator Kennedy. Yes.

Mr. DuBoff. That is, while I unqualifiedly endorse the bill as written, I would urge your committee to consider expanding its scope. There is one group of artists who are deprived of the protection of this bill, along with the protection of the copyright law itself, and that is the traditional craft artists or folk artists.

The bill as written would be confined to fine artists, creators of pictorial, graphic or sculptural works, and would perpetuate the discrimination which exists now in the copyright law. There are numerous very fine artists whose creations actually are made in traditional craft forms and who are deprived of the protection of the copyright law, deprived of the protection of this bill, and I would urge your committee to consider including them within its purview.

Senator Kennedy. Well, I think it is a valid point. As I understand, craft artists aren't protected by the copyright law itself——

Mr. DuBoff. That's correct.

Senator Kennedy [continuing]. And this legislation deals only with that particular creative function that is protected by the Copyright Act. I think you have a valid point with regard to the Copyright Act but we were trying to maintain this focus—as you can tell even from the discussion here this morning, we have enough difficulty in this very narrow area, but I think that is a good suggestion and I will try and consult with our other colleagues about how we can best deal with that point which you raise.

Mr. DuBoff. Thank you.

Senator Kennedy. Let me just come back finally to Mr. Hopkins. Do you think collectors of fine art will abandon contemporary art for other work which, because of its age, would no longer qualify for royalties?

Mr. Hopkins. No. Mr. DuBoff's statement, I have been amazed at the resiliency, I suppose, of the contemporary art market. I don't understand it. It is absurd. It is way out of whack with any reality in the world as far as I am concerned, and I think even the artists feel that to a certain extent. Clearly there is a lot of free money floating around this country, and a lot of people that want contemporary art. They will continue to buy it.

The point that was made by the artists earlier, that the true collector will remain devoted under any circumstance, the people that have been collecting for—we call them "tax collectors"—that are collecting for tax advantages or for some other reasons, may not stay involved with the market, but I think it is not going to be impacted one whit by this law.

Senator Kennedy. Do you think collectors would no longer invest in the primary market, in contemporary artists or aesthetic artists, and no longer speculate?

Mr. Hopkins. I'm sorry. I didn't really understand that.

Senator Kennedy. Do you think that, if this bill were enacted, that collectors would no longer invest in the primary market in contemporary artists?

Mr. Hopkins. Well, this is very speculative but my answer is, they would continue to invest. My understanding of the way that the art market is working at the present time in this country is that a large number of self-made entrepreneurs meet on a somewhat regular basis, either in their YPO meetings or this or that or something else. They have all become conscious of the fact that collecting contemporary art is a positive social stigma, more important than jewels and fur coats and automobiles, and as long as that stigma is there to goad them on, they will continue to participate. New money does wonderful things for everything.

Senator Kennedy. Mr. Merryman, I don't know whether your name has been brought up in responses by the others. Is there anything final you would like to say?

Mr. Merryman. Nothing further, thank you, Senator.

Senator Kennedy. I want to thank all of you very much for your presence here and for your responses to the questions. We would like to keep in touch with you as we move forward with the legislation. I want to thank you all very, very much.

Mr. DuBoff. Thank you, Senator.

Mr. Hopkins. Thank you.

Mr. Merryman. Thank you.

[Questions and answers of panel, subsequently received for the record, follow:]

SENATOR GRASSLEY'S QUESTIONS
FOR PROFESSOR MERRYMAN

1. ISN'T IT POSSIBLE THAT AN ARTIST CAN SELL HIS WORK CONDITIONAL UPON THE REQUIREMENTS THAT

   A. THE BUYER NOT MODIFY THE ART WITHOUT THE ARTIST'S PERMISSION?
   B. THE BUYER, WHEN HE RESELLS THE WORK, PAY A ROYALTY TO THE ARTIST?

   IN OTHER WORDS, WHY SHOULD CONGRESS LEGISLATE WHAT INDIVIDUAL PARTIES IN A FREE MARKET CAN ACHIEVE BY PRIVATE AGREEMENT?

2. ON THE ROYALTY ISSUE: ASSUMING THE MARKET VALUE OF AN ARTIST'S WORK INCREASES OVER TIME BECAUSE THE ARTIST HAS ACHIEVED FAME OR POPULARITY, AND THAT THE ARTIST'S LATER WORKS ARE COMMANDING A HIGHER PRICE THAN HIS EARLIER WORKS, THEN WHY SHOULD THE ARTIST BE ENTITLED TO REAP AN ADDITIONAL PROFIT FROM A BUYER WHO TOOK A CHANCE ON THE "UNKNOWN" ARTIST BY BUYING AN EARLIER-PRODUCED WORK AT A LESSER PRICE?

3. ON DEFINING A "WORK OF FINE ART:" AT WHAT POINT SHOULD SOMEONE'S CREATIVE WORK BE ENTITLED TO THE PROTECTIONS OF THE BILL?

   HOW SHOULD THE U.S. COPYRIGHT OFFICE DEAL WITH THE LIKELY INFLUX OF AMATEUR ARTISTS WHO SEEK TO HAVE THEIR WORKS REGISTERED?

   AREN'T WE JUST CREATING A SITUATION FOR A VOLUME OF LITIGATION?

RESPONSE TO SENATOR GRASSLEY QUESTIONS

by

Professor John Merryman
(Chairman, Visual Arts Division, American Bar Association
Forum Committee on the Entertainment and Sports Industries;
Sweitzer Professor of Law and Cooperating Professor of Art,
Emeritus, Stanford University)

1. Yes. It is possible for an artist to insert restrictions against modification of his work and provisions for a resale royalty in the contract of sale of the work. The difficulty, however, is that works of art may change hands many times, and the law provides no way for such restrictions to "run with" the work of art. As I pointed out in my article, "The Refrigerator of Bernard Buffet", 27 Hastings L. J. 1023, 1043-4 (1976):

> Even if the first owner expressly agrees. . . there is no way of securely binding his successors. The notion of a servitude of the sort commonly attached to land by private agreement depends for its effectiveness on notice to subsequent takers; a purchaser without notice of the restriction takes free of it. Such a system of servitudes works reasonably well for land both because of the system of public records (and the notion of "record notice") and because of the apparentness of many kinds of servitudes to one who physically inspects the land. But there is no equivalent system of public records of transactions affecting paintings, drawings, and sculpture. And

most works of art would be unacceptably defaced by any attempt to attach notice of restrictions to them in some permanent and indelible, and at the same time reasonably apparent, way.

2. Yes. As the question implies, the assumptions commonly made by proponents of the resale proceeds right show that they fail to understand the art market. They assume that the market discriminates against artists and that market corrective legislation is needed. On the contrary, those visual artists who have a resale market (only a handful, out of the hundreds of thousands of living American artists, do; they are the ones who would benefit from the resale proceeds right) are very well rewarded by the primary market for art. Indeed, successful painters and sculptors are more richly rewarded than composers, authors, dancers, instrumentalists and singers (possibly excepting a few rock musicians). Picasso was a billionaire; Andrew Wyeth, Frank Stella, Robert Rauschenberg and Jasper Johns are wealthy men. So is Julian Schnabel, who is still in his early thirties.

It is the great mass of unsuccessful artists who attract one's sympathy and might arguably need additional compensation. But these, by definition, are the ones the resale proceeds right would not help. They have difficulty selling their work on the *primary* market. Only the handful of successful artists have a secondary market. They are the only ones who would derive any benefit from the proposed resale proceeds right, and they are richly rewarded without it.

3. Yes. The problem of distinguishing between works of art that are the work of serious artists and "art" produced by children in finger-

painting classes and other trivial objects that take equivalent form is a difficult one. In California, the term "fine art" is used and is defined as follows:

> "Fine art" means an original painting, sculpture, or drawing . . . of recognized quality, and of substantial public interest. Cal. Civil Code s989 (b) (1).

The statute provides that in a dispute the trier of fact shall rely on the opinions of enumerated experts ("artists, art dealers, collectors of fine art, curators of art museums, and other persons involved with the creation or marketing of fine art").

Whether this kind of question would attract or encourage litigation is not clear. In practice, few parents are going to go to court to prevent alteration of their children's "paintings" that have somehow fallen into the hands of third persons. Most Sunday painters have difficulty giving their work away and the problem seldom arises. There may be cases in which a collector or a museum person or a dealer has abused a work and defends an action on the ground that it is not "fine art", but I know of none and would not expect that kind of defense to arise very often. In California, with the most extensive "moral right" legislation in the U.S.A., going far beyond the proposals in S. 1619, there is still no reported litigation and little that is unreported.

The suggestion that amateurs might seek status by registering their works illustrates one of the many problems with the register proposed in S. 1619. France, when it enacted the *droit de suite* in 1920, provided for such a register, which many hoped would become a useful source of information and would help in dealing with problems of authenticity and provenance. It was a failure, for reasons that reflect the way people are. Some were too lazy to register, others forgot, others preferred to avoid the publicity of registration. On the contrary, fakers, forgers, people who held works of dubious authenticity, etc. happily flocked to the record to gain the cachet of registration for such works, and the record was corrupted. S. 1619 contains nothing to protect the integrity of the register it proposes, and would predictably end up a costly and publicly misleading failure.

SENATOR HATCH'S QUESTIONS

FOR PROFESSOR MERRYMAN

1. WE HAVE HEARD THAT THIS RESALE FEE WOULD BENEFIT MATURE OR ESTABLISHED ARTISTS AT THE EXPENSE OF YOUNGER DEVELOPING ARTISTS. IS THIS CORRECT?

2. IN YOUR VIEW, WILL THIS RESALE FEE AND THE MORAL RIGHTS DOCTRINE WHICH MIGHT INHIBIT HOW A NEW OWNER MIGHT USE OR DISPLAY A NEW WORK AFFECT A COLLECTOR'S WILLINGNESS TO INVEST IN RECENTLY CREATED WORKS OF ART?

3. WE HAVE HEARD THIS A 5% RESALE FEE OF SOME KIND HAS BEEN IN EFFECT ALREADY IN CALIFORNIA. TO WHAT EXTENT HAS IT BEEN EASY OR DIFFICULT TO ADMINISTER AND WHAT EFFECT HAS IT HAD WHERE IT HAS BEEN APPLIED? ON THE SAME SUBJECT, DO YOU THINK THAT CALIFORNIA IS A GOOD MODEL TO STUDY OR WOULD A FEDERAL RESALE ROYALTY HAVE A DIFFERENT EFFECT?

4. WE HAVE ALSO HEARD THAT MOST ART DEPRECIATES IN VALUE IMMEDIATELY AFTER PURCHASE. IN THOSE INSTANCES OWNERS AND COLLECTORS ACCEPT A LOSS FOR WHICH THEY ARE NEVER COMPENSATED. DO YOU THINK THAT ARTISTS ARE GENERALLY ADEQUATELY REWARDED BY THE MARKET SYSTEM ACCORDING TO THEIR MERIT OR IS THIS RESALE ROYALTY NECESSARY AS AN INCENTIVE FOR CREATIVITY?

RESPONSE TO SENATOR HATCH QUESTIONS

by

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Emeritus, Stanford University)

1. Yes, the resale fee would give the handful of already successful, affluent artists (the only ones that have a resale market) a little more. The ramaining hundreds of thousands of American artists who have no resale market would get nothing. Where would the additional money that went to Andrew Wyeth and Robert Rauschenberg and a few others come from? Certainly not from some additional flow of money into the market for the work of living artists; if anything, the resale proceeds right would discourage people from buying contemporary art and thus reduce the size of the pot. The few successful artists would get get a larger part of a smaller pot. That could only mean that the great mass of unsuccessful artists would get less. It is Robin Hood backwards: taking from those who have not and giving to those who have. Here is an illustration of how it would work:

> A dealer who shows the work of unknown but promising artists cannot stay in business on the income from sales of their work. The prices they bring are low, sales are difficult, and the expenses of running a gallery are relentless. Most such dealers stay in business by also dealing in the secondary mar-

ket, buying and selling the work of successful artists. Profits from their secondary market activity enable them to subsidize their activity in promoting and supporting the work of emerging artists. The resale proceeds right, by taking part of the secondary market profits from the dealer, reduces his ability to subsidize the unrecognized artists he represents. He will put on fewer shows, be able to afford less publicity, be less able to entertain curators, collectors and critics, may have to move to a less desirable location, where rents are lower, and so on.

2. Yes. It seems clear that the resale proceeds right will discourage people from buying the work of living artists, thus directly harming the people who appear to want help (and who, misguidedly, often support the right). The only question is how strong the discouraging effect might be, and no one knows the answer. Even if the effect is small, it is undesirable. Those who care about art (and artists themselves, one would think) would prefer to encourage the flow of money into the contemporary art market, and particularly into the support of the multitudes of serious, unrecognized, unsuccessful artists. The resale proceeds right has precisely the opposite effect.

It is less clear that the moral rights in S. 1619 would have such an effect, since few people want to claim someone else's work as their own or would wish to deface or alter an art work. I have never heard a California collector or museum person say that California's moral right law has discouraged him or her from acquiring the work of a living artist.

I have heard many say that their actions have been affected by the California resale proceeds right law.

3. The California law attempts the impossible: it attempts to apply to dealer sales and private sales. *In France, the source of the right, the law applies only to sales at public auction.* Dealer sales are largely, and private sales totally, impossible to document, control or police. Sales at public auction, being public, are of course easy to watch. Thus the French law expressly, and the California law in practice, discriminate against auctioneers and in favor of dealers and private sellers.

The California law has the additional disadvantage that it is easily evaded, thus hardly increasing respect for law, or for the law-makers who enacted it. It is widely ignored, capable only of occasional, adventitious enforcement. It is regarded by people in the California art world, including many artists, as a foolish and mischievous law.

One immediate effect of the California law has been that many consignments of contemporary art for resale now leave California. Consignors send their works to New York or London; buyers, who go where the works are offered, follow them. Thus the California art market is weakened to the advantage of New York and London. S. 1619 would have a similar effect on a national scale. The United States is presently the strongest contemporary art market in the world, concentrated in New York. Adoption of S. 1619 would create an incentive for consignments, and consequently buyers, to go abroad, strengthening the British and other foreign art markets at our expense. That would harm everyone in the U.S. art world (including artists, since the U.S. market naturally tends to promote and support the work of American artists, and a weaker U.S. art market would mean less promotion and weaker support).

4. Yes. It is true that the work of most artists declines in value and that people who support the work of living artists, as do dealers and collectors, face an army of potential losers and a tiny number of potemtial successes. The uninformed fail to understand that the few winners have to compensate for the many losers. It takes just as much of an investment to promote and sell, or to buy, the work of an artist who may remain obscure, whose work may decline in value, as it does to support the work of one who may become a Rauschenberg or Wyeth or Johns.

On the compensation of visual artists, it is clear that those who succeed are richly rewarded, much more richly rewarded than a pianist like Rudolph Serkin or a violinist like Jascha Heifetz or a dancer like Mikhail Baryshnikov or a writer like Saul Bellow. Picasso was a billionaire. Andrew Wyeth, Robert Rauschenberg and Julian Schnabel (an artist still in his early thirties) are rich men. The proposition that successful artists are in any sense inadequately rewarded is laughable. Unsuccessful artists may in some sense be inadequately compensated, but they are the ones who, by definition, have no resale market. The resale proceeds right would not help them.

The idea that artists would be stimulated to greater creativity by the prospect of additional income from the resale proceeds right is difficult to take seriously. What emerging artists most want and need are first sales, and the resale proceeds right tends to discourage the primary, or first sale, market for the artist's work. If the Congress wishes to do something to encourage living American artists, there are many ways to go about it that promise to be more effective while encouraging, rather than harming, the contemporary art market. I would be happy to supply suggestions on request. At this point it is enough to emphasize that the resale proceeds right provisions of S. 1619 would have serious ill effects throughout the American art world and would provide trivial benefits -- a little extra income -- to a few already successful, affluent artists.

SENATOR GRASSLEY'S QUESTIONS
FOR HENRY T. HOPKINS

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AREN'T WE JUST CREATING A SITUATION FOR A VOLUME OF LITIGATION?

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December 21, 1987

Dennis DeConcini
Chairman
Subcommittee on Patents,
Copyrights and Trademarks
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Mr. DeConcini:

In answer to the questions of Senator Grassley:

I. The artist sometimes does attempt to place selling and molestation requirements upon a buyer, but the difficulty comes in enforcement. The work of art is often sold through a dealer many years after the original sale and the artist simply cannot keep track. A national law, with some enforcement guidelines applying to all, equally, would begin to establish a broad-based habit pattern.

II. Why should an art dealer or auction house receive payment each time a work of art is sold any more than the artist should? If the artist did not create the work, it would not exist for sale or re-sale.

Further, if the artist did not continue to produce and to work diligently to expand his reputation, as well as the value of his work, then the owner would never reap a profit. The royalty is the artist's reward for continued excellence and for rewarding his patrons.

III. I feel that all artists who consider themselves to be artists, whether amateurs or professionals, should register for a copyright. But the Bill would only impact those artists when the work was originally sold for no less than $2,500.00 and was re-sold at at least a 50% profit beyond that. The higher base would not hinder artists from registering, but it would keep them from benefitting until they were selling for prices consistent with professional stature. This would eliminate the need to define a work of art other than generically as an original painting or sculpture created to be art. It would also limit litigation to legitimate cases.

Henry T. Hopkins
Director,
Frederick R. Weisman Collection

HTH/llf
attachment

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OF COUNSEL
LEONARD D. DUBOFF**
PROFESSOR OF LAW
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December 23, 1987

Senator Dennis DeConcini
Senate Office Building
1st and Constitution Avenue, N.E.
Washington, D.C. 20510

Dear Senator DeConcini:

Thank you for forwarding to me the questions that were posed by members of the Judiciary Committee's Subcommittee on Patents, Copyrights and Trademarks.

I am happy to provide you with answers that supplement and clarify my testimony and am not only honored, but also delighted to have the opportunity to further express my unmitigated support of the Visual Artists Rights Act of 1987 (S.1619). Enclosed please find a response to each of the questions posed by Senators Grassley and Hatch.

Again, thank you for the opportunity to express my support. If I can be of any help in the future, please do not hesitate to call.

Sincerely,

Leonard D. DuBoff

LDD/klm
Enclosure
cc: Senator Kennedy

Testimony of Leonard D. Duboff
Responses to Questions of Senator Grassley and Senator Hatch
Committee on the Judiciary
Subcommittee on Patent, Copyright and Trademark
December 23, 1987

Senator Grassley
QUESTION 1:

Isn't it possible that an artist can sell his work conditional upon the requirements that:

A. the buyer not modify the art without the artist's permission?

B. the buyer, when he resells the work, pay a royalty to the artist?

In other words, why should Congress legislate what individual parties in a free market achieve by private agreement?

ANSWER:

Senator Grassley's question is an excellent one. The short answer is theoretically, yes, but practically, no. I need not enumerate to this Committee the instances of Congressional legislation enacted to statutorily regulate commercial transactions which could be contractually achieved between the relevant parties. Among the myriad reasons for such legislation is the protection of those who neither write nor understand contracts and/or contract law. Based upon my considerable experience in researching and teaching art law and in representing artists and their rights, I can unequivocally opine that most artists are in need of such statutory protection. Were it not so, the copyright laws themselves would be unnecessary. Most American artists are unaware of the most basic of their statutory rights under the current copyright laws, and are often taken advantage of despite those statutory rights.

My earlier testimony before this committee touched upon the viability of an artist contracting with the purchaser of his or her work, in order to place conditions upon such things as modification and resale or other forms of transfer of artworks. The topic, however, is worthy of a more complete discussion. Certainly, it is possible for an artist to make the sale of an artwork conditional upon certain terms. Private agreement can, in the best of all possible worlds, achieve the desired result. Private agreements, however, like statutes, are only effective when properly enforced; generally in the milieu of the art world, they will not work as contemplated in the contract.

Even though they are the creators of the works we have all come to enjoy and even prize, artists occupy a relatively weak bargaining position in the art market. While the ultimate purchasers of art work may be likely to agree to certain contract terms protecting the artist's work after sale, the difficulty that artists experience in selling their work lies primarily with the purveyors of art work, the art dealers with whom they must usually place their work in order to sell it.

Art dealer resistance to any question of artists' rights has been no more apparent than at these hearings. Dealers' associations, along with professionals and non-professionals who represent dealers, and people who are married to dealers and anybody else who is marginally involved with art dealers have been present. They have articulately voiced their opposition to legislation that would grant to artists those rights which individual artists are usually unable to achieve by private contract. The dealer resistance I have heard appears to be based upon the fear of additional paperwork and responsibility without the assurance of additional dealer commissions. There is, however, no indication of consumer resistance to legislated artists' rights. Artists who seek to protect their interests in their work have traditinally been discriminated against by those who find it easier to deal with artists who are forced to abandon future pecuniary interests in exchange for immediate compensation. The proposed legislation embodied in S. 1619 if enacted will provide the type of underlying protection of artists in the manner that minimum wage laws and unfair employment practice laws have benefited unskilled workers. Simply stated, dealer selectivity based upon the personality and astuteness of the artist rather than the quality of the art itself will be abrogated.

I would add here that a few states have enacted laws protecting consumers and artists. These laws have become known as "fine print" and/or "fine art consignment" legislation. Most art dealers and gallery owners in those states lobbied against passage of the statutes, decrying the additional paperwork, and related administrative and insurance costs associated with their compliance with those laws. They pleaded their cases eloquently, citing the probability of lost profits and consequent lack of marketing efforts and sales of artists' works. Not surprisingly, upon the passage of of those laws, not many galleries or dealers went out of business. As is the norm, they raised prices to the end consumers, who are still getting a bargain when they purchase works of art by aspiring artists.

QUESTION 2:

On the royalty issue: Assuming the market value of an artist's work increases over time because the artist has acheived fame or popularity, and that the artist's later works are commanding a higher price than his earlier works, then why should the artist be entitled to reap additional profit from a buyer who took a chance on the "unknown" artist by buying an earlier-produced work at a lesser price?

ANSWER:

While this too is an excellent question, the focus should not necessarily be confined to only the royalty paid by a purchaser, but also on adequate compensation for artists. Visual artists are presently forced, at least as to their earlier works, to sell their works at sacrifice prices, in the hopes of becoming recognized and being able to demand higher prices in the future. If we as a society are to encourage cultural development in this country and promote the visual arts, we must offer artists the incentive to succeed financially. Artistic creatitivity in and of itself does not pay the rent. Resale royalty legislation would provide a beacon to all artists, whether or not their work is currently in vogue. The California study indicated that the vast majority of artists, whether qualified to participate in the California resale royalty or not, support resale royalty legislation. This form of legislation would provide a goal for aspiring artists. The laws of the United States provides many incentives for new businesses and small businesses to not only survive, but to prosper. The creative business person has been granted many opportunities and special programs. Legislatively, however, we have generally failed to recognize that the creativity of a visual artist is, in fact, that artist's business. It is a business which more so than most others, is dependent upon the whim of the consumer, and is dependent upon the consumer's discretionary dollar. As will be discussed later in this testimony, when an appreciative consumer has made the decision to spend those discretionary dollars on visual art, that consumer will most likely not begrudge the few extra dollars that this legislation will provide to the artist.

QUESTION 3:

On defining a "work of fine art": At what point should someone's creative work be entitled to the protections of the bill?

How should the U.S. Copyright Office deal with the likely influx of amateur artists who seek to have their works registered?

Aren't we just creating a situation for a volume of litigation?

ANSWER:

In response to the first portion of the question, I would, as stated in my earlier testimony, advocate that the definition of "fine art" be broadened to include "folk art" and that which is currently termed "craft art". In my opinion, a work of excellent craftsmanship is every bit as fine and as creative as what is currently termed "fine art". All artists should be afforded the protections which have heretofore been accorded only creators of so called "fine art." It is unconscionable that a marvelous piece of weaving, if exhibited on a wall, is considered fine art, but if placed on a floor or around the shoulders of a woman, is considered utilitarian and therefore not protectable under our current copyright laws.

The above opinion notwithstanding, it would be not only beneficial, but only fair, to include amateur artists and those who have not yet achieved popular recognition, in the scope of this legislation. Beauty may be in the eye of the beholder, but art is in the mind of the creator. Art need not be recognizable, acceptable, nor marketable, as such, to the consumer. This is the area where the market, i.e., the ultimate purchaser, will determine the "success" of the artist.

We are all aware that there have been many works of art (particularly in the area of writing) which have been financially unsuccessful until the artist has created a work which was an immediate "smash". Suddenly those earlier works become sought after and enjoy a so-called "coat-tail" popularity, merely because they bear the name of the finally acclaimed artist. In the eyes of art experts, these works are not particularly good, but they sell like the proverbial hotcakes. Should not the artist share in the unexpected largesse? Yes, indeed. Today's amateur may very well be tomorrow's ingenue.

In response to the second portion of this question, I would point out that the Copyright Office currently does not purport to judge the aesthetic value of works which are the subject of applications for copyright registration. The Register of Copyrights only makes a judgment as to the copyrightability, pursuant to the the current statutory standards, of the work submitted. It is my understanding that under the proposed legislation these standards would not change. Current registrability requires only originality - not uniqueness, not marketability. The Copyright Office makes no judgment as to aesthetics or quality, and draws no differences between "amateur" and "professional," as indeed it should not.

Because of the fact that presently anyone can register the copyright in his or her work, assuming that the work falls within the current purview of the copyright law, the issue of registration in and of itself would not arise if the proposed legislation passes.

With respect to the third portion of this question, it is my opinion that passage of this legislation would not encourage litigation. It has long been my position, however, that we do need a federal art registry in this country. L.D. DuBoff, The Deskbook of Art Law, 470-72 (1977). Judicial recognition of this need is given in the Georgia O'Keeffe case. O'Keeffe v. Snyder, 83 N.J. 478, 416 A. 2d 862 (1980) (citing DuBoff). Indeed, the judge pointed out that a registry would alleviate such problems as existed in that case and in numerous other instances of art theft and forgery.

Once appropriate regulations and guidelines were in place, the Copyright Office would merely continue its excellent administrative practices. The Copyright Revision Act of 1976, which went into effect on January 1, 1978 did not produce a flood of litigation concerning the scope of copyright registration; in fact, only a few cases broach this topic. I would be suprised if this legislation provoked such a flood. As the Register of Copyrights testified before this Subcommittee, the Copyright Office could charge a nominal fee (perhaps even an optional fee) to administer the federal registry of sales, as it currently charges a nominal fee for registration of copyrighted works. In fact, it is likely that this cost would discourage dilettantes and rank amateurs, while providing the serious artist the opportunity to protect his or her earlier works with the potential of capitalizing upon them later in his or her career.

No one is capable of determining which artists, presently be considered amateurs - even those who may indeed presently consider themselves amateurs - who may later be recognized as "great." Certainly, many artists have not been considered "successful" as fine artists until late in life, or even after death, as in the case of Vincent Van Gogh. Van Gogh actually sold only one piece of his art work during his lifetime, but his works now are selling for upwards of fifty million dollars ($50,000,0000.) Obviously, under our current copyright laws, and even under the proposed legislation, neither Van Gogh nor his heirs stand to gain anything from those fantastic prices. As a more current example, however, Salvadore Dali is precariously close to death; even today an (authentic) original 1920 to 1970 painting of Dali's would garner fabulous sums. After his death those sums will probably skyrocket. Under present statutes, neither Dali nor his heirs will realize any of that fabulous gain, but some art dealer certainly will.

Using Dali as another example is timely, because of what is now becoming known as "Dali-scam." If his works were currently in some type of federal registry, thousands of purchasers of fake Dalis would have had a means by which to determine the authenticity of those works. Many of those fakes were touted by unscrupulous dealers as sure-fire investments. We have securities laws to protect investors in stocks and bonds, but in the area of "investment art" consumers are left to the mercy of hucksters. Not having a form of federal registration of art work can create the saddest area of potential litigation.

Senator Hatch
QUESTION 1:

We have heard that this resale fee would benefit mature or established artists at the expense of younger developing artists. Is this correct?

ANSWER:

This is not a totally accurate statement of the effect of resale royalty legislation. Certainly, as my previous testimony indicates, one immediate effect of this legislation would be to benefit established artists. Keep in mind, however, that these established "successful" artists were once the young starving artists you probably have in mind. One can liken it to Social Security...I pay into it now, and older people are receiving the current benefits. Without getting into a discussion of the future of Social Security, I know that one of these days I hope to be the recipient of benefits which are being paid for by the younger generation behind me. Much like the position that artists are in, Social Security exists precisely because employees are generally in a weak bargaining position, and therefore legislation was passed to protect them.

The result of the study conducted in California by the Bay Area Lawyers for the Arts, "BALA Surveys Artists and Galleries on Resale Royalties" at 1 (Alma Robinson, Nov. - Dec. 1986) shows that the vast majority of artists, both mature and aspiring, are in favor of protection like this. Aspiring artists in California view resale royalties as a goal, an incentive to continue sacrifices in the hope of becoming recognized and successful. I would posit that they also view it as a possible security for their future.

QUESTION 2:

In your view, will this resale fee and the moral rights doctrine which might inhibit how a new owner might use or display a new work affect a collector's willingness to invest in recently created works of art?

ANSWER:

The answer to this question is again no. It is my position, as an art law professor, an art lawyer and as an art collector that collectors do buy and will continue to buy art that they like. It is they who have no emotional attachment to a work of art who consider an artwork fungible or interchangeable with other works of art. This may include a minimal number of consumers who consider their purchases as investments (and these are often purchasers who not only know nothing about the resale value of art, but who currently have no way of checking on the viability of their so-called "investments") More often, these individuals are the art dealers who purchase only for resale, who buy art as they would pork bellies or any other commodity, and are unconcerned with aesthetics. Collectors, on the other hand, once attracted to a work of art, are not likely to intentionally distort, mutilate or alter the art they have purchased. The aesthetic preference of a collector - a true lover of art - would be unaffected by the requirement that a percentage of the resale price be returned to the artist. In addition, under this proposed legislation, the resale royalty would only be paid where the artwork has substantially appreciated in value.

QUESTION 3:

We have heard this 5% resale fee of some kind has been in effect already in California. To what extent has it been easy or difficult to administer and what effect has it had where it has been applied? On the same subject, do you think that California is a good model to study or would a federal resale royalty have a different effect?

ANSWER:

This is a particularly relevant question, in that it focuses upon what is unfortunately the only empirical study of resale royalties legislation of which I am aware. The California Resale Royalties Act, therefore, offers us a valuable opportunity to evaluate the success of this kind of legislation. It must be remembered, however, that its successful implementation has only been on a statewide scale. It is my opinion that the expansion of the scope of protection to all sales of artwork in this country can only result in an even greater success than that realized by the California model.

The California study was conducted by the Bay Area Lawyers for the Arts, (BALA) whose recent consolidation with the Los Angeles Lawyers for the Arts has created a state-wide organization of independent attorneys involved in art law and concerned with our society's cultural growth. This study by independent professionals indicated that the majority of those involved in the arts in California are in favor of resale royalties. The results of the study show that 83% of the artists and 71% of the dealers surveyed approved of the legislation. Considering the amount of lobbying against the proposed federal legislation by art dealers nationwide, I view with satisfaction this overwhelming support by California art dealers.

The overriding criticism of the California legislation has been that it is jurisdictionally limited to California, and has thereby caused art dealers to "bail out" of the state in order to avoid compliance with the statute. As pointed out in my previous testimony, if there is any validity to the argument that Sotheby's ceased its contemporary art auctions in California in order to avoid the resale royalties (and the president of Sotheby's testified that this was only one of many reasons for the departure), then a federal law providing for resale royalties would put an end to such practices. A federal law would also dispense with a second criticism of the California legislation: that it creates difficulties in extraterritorial application and enforcement.

QUESTION 4:

We have also heard that most art depreciates in value immediately after purchase. In those instances owners and collectors accept a loss for which they are never compensated. Do you think that artists are generally adequately rewarded by the market system according to their merit or is this resale royalty necessary as an incentive for creativity?

ANSWER:

Unfortunately, artists are not adequately compensated for the work they create during their developmental stage. The purported decline in value that occurs after the purchase of such a work of art is often the result of the purchaser paying for more than simply the intrinsic value of the piece. The purchaser is generally also paying a fairly hefty dealer's commission. Although this is not always the case, the work must then usually appreciate sufficiently in value to exceed its original intrinsic value by the amount of the dealer's commission just to recoup its "purchase price." Obviously, it must appreciate even more in value if the purchaser is to make a profit on resale.

The United States Constitution grants Congress the power to "promote the progress of science and useful arts." U.S. Const. Art. I, § 8, cl. 8. It is therefore appropriate that Congress enact the type of legislation proposed by S. 1619 for the purpose of providing encouragement to artists and promoting the visual arts. Resale royalty legislation is imperative in order to provide artists with an additional incentive to continue the sacrifices which are generally required early in their careers. As the California study indicates, most artists, aspiring and successful, are in favor of this legislation.

Respectfully Submitted,

Leonard D. DuBoff

December 23, 1987

Senator KENNEDY. Our next witness, Frederick Woolworth, the president of the Art Dealers Association.

Mr. Woolworth, we are glad to have you here and look forward to your comments.

STATEMENT OF R. FREDERICK WOOLWORTH, PRESIDENT, ART DEALERS ASSOCIATION OF AMERICA, INC.

Mr. WOOLWORTH. Mr. Chairman, my name is Frederick Woolworth and I am the president of the Art Dealers Association of America, an association of the Nation's leading art dealers. I thank you for this opportunity to appear before your committee and provide our views on S. 1619.

I have been an art dealer for nearly 20 years and a collector for 15 years before I became a dealer. My gallery, the Coe Kerr Gallery, specializes in 19th and 20th century American artists, and we are devoted to their interests to the point that we encourage all our living artists to copyright their works. We in the Coe Kerr Gallery represent 17 living artists, three of which generate profits to the profitable status of my gallery, to the point where they subsidize the 14 less successful and younger artists that we give shows to on a regular basis at great expense to help them further their careers.

All the dealers who work closely with living artists, as we do, are supporters of legislation which would benefit artists. In that sense we have the same goal as you do. It is not easy for me to oppose legislation which is well motivated, but we must oppose the resale royalty because it is detrimental to the interests of the vast majority of artists. The so-called resale royalty is not a royalty at all, as I understand the term. It is really forced profit-sharing.

I might stop there for one minute. Listening to the artists that have testified before me about an early work selling for $800 and then a later work selling at an auction for $80,000, I know of no artists, at least to my knowledge, that don't retain a percentage of their yearly output, and as their market grows in stature the successful artists release, on their own, works from those periods that now generate large amounts of money. They do have an alternative avenue, as far as I am concerned.

Only a small number of artists have a resale market, probably less than 1 percent of living artists. The bill would provide additional income only to this very small number of already highly successful artists, but at what cost? The cost would be borne by less successful artists, because the net result will be to make their works, which are already the most difficult to sell, even more difficult.

Artists need a healthy art market. The resale royalty, by imposing an additional tax on the relatively small percentage of works which are sold at a profit, will certainly inhibit sales. Although it is said that it is only fair that the artist should participate in the profit on the sale of a work of art, which is comparatively rare, there is no provision for participation in the more usual loss. That loss is borne entirely by the collector, the consumer, those who support living artists by taking a financial risk in purchasing their work. When purchasers suffer a loss, it is not even tax deductible.

In the rare case of profit, S. 1619 would increase the tax. This, Mr. Chairman, in my opinion is not fair to purchasers.

The bill also provides for a registration system for sales of art. I would like to tell you in the strongest possible terms that purchasers and sellers of art, like most other people, enjoy their privacy and do not want to place their personal purchases or sales on public record.

I might give you a personal example of this. In 1973 my family had a rather well-known 19th and 20th century American collection which they put on public view for the very first time. In the spring of 1973 when that collection was returned to its premises, a robbery took place where 54 major works were absconded with and have never been recovered.

Throughout the arts in the past 10 years, I think I have gotten to know most of the collectors, at least in my field, and privacy is their No. 1 issue. The kidnaping of paintings is an ongoing problem, and when you go to museums or art galleries to see major shows, you probably wonder to yourself why 50 percent or more of the objects shown have "lent anonymously." For that very reason, privacy is all-important to the collector.

To the artist, they guard their client lists to such a degree, and their wives even more so. They don't want to have their lists pirated by other young artists, seeking clients, that may paint in the same manner.

In closing, I would like to again say forced profit-sharing is bad for the art market and not in the best interests of artists. We earnestly hope that, upon reflection, you will agree with us and not go forward with this proposal.

Mr. Chairman, one other matter. We both have a very close mutual friend who is an artist, and he has recently brought to my attention that you yourself have received notoriety as an artist. I would love to be able——

Senator KENNEDY. You are going to make me blush now. [Laughter.]

Mr. WOOLWORTH. I would love to have the opportunity to see your work, and possibly encourage you to come to the gallery so at first hand you can learn the other side of this story.

Thank you.

[Statements of Mr. Woolworth follow:]

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Statement of R. Frederick Woolworth in Opposition to Section 3 of S.1619

I am the President of the Art Dealers Association of America, Inc. ("ADAA"), an association of the nation's leading dealers in works of the fine arts. ADAA, which was founded more than 25 years ago, has approximately 130 members in cities across the country.[*]

We are opposed to Section 3 of S.1619, which would provide a so-called resale royalty to be paid to the artist on the sale of certain works of art. There are also serious problems with other parts of the bill, to which I will later refer.

I have been an art dealer since 1969 when I became the principal owner of the Coe Kerr Gallery in New York City which specializes in 19th and

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[*] ADAA's membership is relatively small because the standards for admission are high. In order to become a member of ADAA, the dealer must have been in business for at least five years. He or she must have a good reputation for honesty and integrity in dealings with the public, artists, museums and other dealers. In addition, the dealer must be a professional art dealer, a knowledgeable expert and connoisseur in the works of the artists or period in which he or she specializes. Finally, the dealer must make a substantial contribution to the cultural life of a community by the nature of the works offered for sale, worthwhile exhibitions and informative catalogues and other publications.

20th century American works of art. The gallery is active in the primary market, representing living American artists in the exhibition and sale of their work, and we are also active in the secondary market, which involves the resale of works of art after they have been sold by the artist. In this connection, it should be noted that only a minute percentage of American artists, perhaps 300 of the approximately 200,000 working artists, have a secondary market for their work.

The Coe Kerr Gallery represents 17 living American artists. Some of the artists we represent, like Andrew Wyeth and Jamie Wyeth are very well known and highly successful. Others are less successful; some are at the beginning of their careers. In representing an artist the gallery makes every effort to promote and advance the artist's work and the artist's career. We provide exhibitons and illustrated catalogues. During the period between exhibitions, we keep our artists' work in stock so that we can show it to museums and private collectors. We attempt to place our artists' works in good private and museum collections and to have works by our artists exhibited in shows in institutions in this country and abroad.

We treat all of our artists alike. We pay all of the expenses associated with the exhibition and sale of the works of the artists we represent. Those expenses include catalogues which we prepare and which cost between $25,000 and $30,000, advertising, announcements, photography, insurance and the expense of the exhibition opening.

The Coe Kerr Gallery spends approximately $50,000 for each exhibition of one of our artists. Most of our exhibitions of works by living American artists are not profitable. Those exhibitions are subsidized, in effect, by our sales of works by the more successful artists which the gallery represents and also by sales of works of other artists in the secondary market.

It may require four or five exhibitions of an artist's work over a period of years to educate the public and to develop the market for an artist to the point where the artist can earn a decent livelihood from those sales, and the gallery can show a profit. In some cases, we are not successful in developing a market for an artist. It would be much more profitable for the gallery to devote itself to fewer, more successful, more readily salable artists. But we are deeply committed to American art and to living artists. They need help in establishing themselves, in showing their work and in reaching the public.

If the Congress wishes to help artists, it should direct its efforts to the artists who need help -- the less successful artists. They can be best helped by taking steps to promote a healthy art market so that they can sell their work. There are more people interested in art today than at any time in history. This interest is demonstrated by attendance at museums and art galleries. The Coe Kerr Gallery has more visitors now than it has ever had, and I believe that this is also true for my dealer colleagues. More people are supporting living American artists by buying their works. But there is still a long way to go and much to be done. More support for living artists is needed, more collectors need to be encouraged.

The provision for a resale royalty in S.1619, however well intentioned, is counter-productive. While it will provide additional income to that very small group of already highly successful artists who have a secondary market, it is ultimately harmful to the interests of most artists. It is also unfair to collectors and a disincentive to collectors of art by living artists who are willing to support those artists by taking the risks involved in buying their works.

Before reaching the very substantial problems which the so-called resale royalty will cause, some discussion of semantics is appropriate.

The definition of "royalty" in the Random House Dictionary of the English Language is "an agreed portion of the income from the work paid to its authors, composers, etc., usually a percentage of the retail price of each copy sold". In other words, a royalty is an agreed payment on a per piece basis to creative artists for the use of their work whether or not the book publisher, music publisher or play producer who uses the work makes a profit. The so-called royalty for the resale of a work of art is, therefore, not like the royalty paid to authors and composers. Authors and composers receive their income from licensing the copyrighted reproduction rights to their works. The visual artist's income is derived from the sale of the work itself*. Authors do not receive a royalty on the resale of a first edition of their work; this is the comparable analogy to the resale of a work of art. The resale of a work of art does not involve any copyright license. The proposed resale royalty is therefore not a copyright royalty at all; it is in reality a forced profit sharing, a special tax imposed for the benefit of a small group of highly successful people.

It has been argued that the artist has a continuing interest in his or her work of art, that it is unfair for a collector to profit from the resale of those works to the exclusion of the artist who created the work and that, as a matter of fairness, the artist should share in that profit by way of a resale royalty.**

The first response to that argument is that in fact artists do benefit very substantially when their works are resold at a higher price in the secondary market. When, for example, a work by an artist represented by the Coe Kerr Gallery sells at a high price at auction, there is a direct upward effect on the prices of the work which the artist is currently offering for sale. In addition, most artists do not sell everything which they make. When prices rise in the secondary market, the value of the work which the artist has retained also appreciates. Although indirect in nature, the artist shares in the collector's profit on resale of the artist's work.

But only a very small percentage of works of art appreciate in value. It is safe to estimate that 99% of works of art by living artists will not increase in value; their value will decline. Most buyers of such works, or their families, will suffer a loss. Is it fair for the artist to share in the rare profit where the artist does not participate in the usual loss?

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* Some artists derive income from the sale of copyrighted reproductions of their work, and they are free to do so by placing a copyright on the work. Generally speaking, however, this is not a source of income for most visual artists.

** Some important artists now require purchasers of their work to agree to share any profit on the resale of their work. They are able to do so because they are highly successful and their work is in great demand. Other artists, particularly younger, less well-known artists, cannot as a practical matter impose such a requirement because it would substantially inhibit the sale of their work. S.1619 requires the imposition of such a requirement whether or not the artist wishes it and whether or not it might inhibit sales of the artist's work, as it will.

In many cases, given the 5% to 10% annual inflation rate over the past decade, a work of art which simply holds its value will increase in price in inflated dollars by more than 50%. In such a case, S.1619 will require the collector to pay a royalty on an increase in price (but not in real value) caused largely, if not entirely, by inflation.

There is a further element of unfairness. Where a purchaser of a work of art, or his or her family, suffers a loss on the sale of a work of art, the loss is not tax deductible. Nor are the costs of insuring, conserving and securing the work over time. Yet, in the relatively rare instance when the work is sold for a profit, a federal income tax and a state income tax, where applicable, must be paid, in addition to the costs of sale. Section 3 of S.1619 would add a further 7% tax to the other taxes paid. This is no way to encourage collectors to buy works of living artists; it is bound to discourage them. And when governmental policy discourage purchasers of works of art, the effect is to make it even more difficult to sell the works which are now the most difficult to sell -- works by younger, less known and less established artists.

To the problem of forced profit sharing is added the problem of registering the details of the sale on the public record in Washington. We do not know how much this new procedure and the necessary bureaucracy will cost. It might be more than the so-called royalties which are collected. As a taxpayer, I object to paying for a government operated registration system designed to benefit only a few successful people. As a dealer, I know that requiring the registration of sales of works of art will create very substantial problems. People who buy art, like most other people, want to have their privacy respected. They do not want to go through the additional paperwork required to register a sale in Washington, and they do not want their private transactions to be put on the public record. From my 20-years of experience as a dealer and my 15-years of prior experience as a collector, from my knowledge of the art market and of how collectors behave, I can testify without hesitation that the requirement of registration in S. 1613 would have a very deleterious effect on the market on sales of works of art.

There is still another problem with forced resale profit sharing. The experience of the Coe Kerr Gallery with exhibitions of works by younger, less successful artists is typical of that of other dealers. Dealers lose money on many of those exhibitions, but are able to show younger artists because those exhibitions are in effect subsidized by sales of works in the secondary market on which S.1619 would now levy an additional tax. The effect of this increased tax on profits is to reduce the ability of dealers to subsidize exhibitions of younger artists.

In summary, the net economic effect of the forced profit sharing which S.1619 provides is to make it even more difficult for dealers to exhibit and sell and for collectors to buy works of younger, less well-known and less successful artists -- the works which are now the most difficult to sell. The resale royalty is truly a regressive tax; one designed to make the rich richer at the expense of the poor*. The resale royalty is unfair, makes no economic sense and will do more harm than good to artists and the art market.

In a recent article on the op-ed page of the New York Times (October 29, 1987) the authors, Schuyler Chapin and Alberta Arthurs supported the resale royalty tax on the grounds of

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* The major beneficiaries of the resale royalty will be the families of a number of deceased artists of the School of Paris, including Picasso, Matisse, Chagall, Miro, Leger, Giacometti.

"fairness" to artists.* I have responded to that argument. The authors also argue that forced profit sharing would have no adverse effect on the art market. I do not believe that Mr. Chapin or Ms. Arthurs have any real knowledge of the art market and, as someone who has been deeply involved with that market for many years, I must disagree with their conclusions.

They argue, for example, that the "whopping" 8-1/4% New York sales tax has not had an inhibiting effect on the New York art market. But the fact is that the overwhelming majority of major works of art sold in New York are sold to purchasers who do not live in New York, so that the New York sales tax does not apply. Moreover, I believe from my experience that the 8-1/4% sales tax has inhibited New York residents from purchasing art. We have urged that the sales tax on works of art be reduced in order to encourage more New Yorkers to buy art.

It has also been argued that the California statute requiring forced profit sharing has not had an adverse effect on the California art market. In this connection, we have made inquiries of California's leading art dealers about the effect of the California statute. In separate conversations they have all said that the California resale royalty provision is widely ignored by collectors in that state. In many cases, collectors have sent works on which a resale royalty would be payable out of the state for private sale. In other cases, the royalty is not paid even if the work is sold in California. The California act, then, is widely ignored, particularly where expensive works of art are involved. Collectors do not want to pay the royalty, and many do not. In the opinion of our California members, based upon their long experience and knowledge of the art market there, if the

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* The authors list themselves as chairman and president, respectively, of an organization known as the Independent Committee on Arts Policy, which is stated to be "a group of artists and arts leaders who examine arts policy issues". An examination of the names on the organization's letterhead shows only one visual artist who will profit from the royalty accorded by the bill, and one museum director whose position, if any, on the bill is ambiguous. We know of no member of the committee who is knowledgeable about the art market and we know of no real inquiry made by the organization, apart from a brief debate in which a representative of Sotheby's appeared, about the effect of the bill on less established artists and the market for their work.

California act were enforced, there would be a dramatically adverse effect on sales of art by living artists. This would likewise be true for the American art market if S.1619 were to be enacted.

It is interesting to note that the idea of enforced profit sharing comes from the French droit de suite. Although Paris was once the world center for the visual arts and a great art market, there is no question that it has dramatically declined in recent years. Only a relatively small number of galleries in Paris show and sell the works of living French artists. And, largely because of government overregulation, the French auction market and the French secondary market no longer have anything close to the importance which they once had.

Some argue that the droit de suite has served as an incentive for artists to produce art. It is doubtful that any law would serve as an incentive for artists to produce; artists make art because of a deeply felt need to do so and not because of any law. It certainly cannot be argued that the droit de suite has incentivized French artists; it certainly has not incentivized French collectors. And, there is no question that the laws enacted in France have had a substantial adverse effect on the French art market. That mistake should not be repeated in this country.

Section 3 of S.1619 presents problems apart from the resale royalty. For example, Section 3 gives "the author of pictorial, graphic, or sculptural works of fine art" the right "to claim authorship of any of his works which are publically displayed". Upon the death of an artist this right is given to "his estate . . . up to 50 years after his death". It is not clear who on behalf of an artist's estate has the very important rights granted by S.1619. Suppose, for example, that an artist has five children and that each of those children has several children. Which of the artist's children and grandchildren have the right to claim [or disclaim] authorship on behalf of the estate.?

Moreover, the right "to claim authorship" has created considerable problems in Europe when exercised by the artist's descendants. There are many instances where works falsely attributed to important European artists were sold as the work of the artist on the basis of certificates claiming authorship which were supplied by members of the artist's family who, in some cases, were paid for those certificates. S.1619 as presently drafted might well create the same problems in this country.

S.1619 as presently drafted is both harmful to the vast majority of artists and a devisive force in the art community. The Congress might take a number of steps to help artists which would have broad support. First, artists are now denied an income tax deduction for work which they create and which they donate to a museum. This is unfair. The interests of artists and of museums would be greatly served by restoring to artists the tax deduction for such donations which they once had.

A second legislative act which would be of great assistance to artists and to the art market has been suggested by Stephen Weil, Deputy Director of the Hirshhorn Museum and Sculpture Garden. There should be enacted a provision in the Internal Revenue Code which would defer any tax payable on the sale of a work of art, provided that within a reasonable time following the sale the collector purchases another work of art by a living American artist. This would provide an incentive for collectors who have profited from the sale of a work of art to recycle back into the market -- and thus back to artists -- 100% of the funds used to purchase every kind of art. This suggestion was made by Mr. Weil in his essay "Resale Royalties: Nobody Benefits", which is reprinted at pages 210-225 of his book, "Beauty and the Beasts" (Smithsonian Press). This thoughtful and perceptive essay is well worth reading.

In 1978 Congressman Henry Waxman, at the urging of some of the same individuals who are now supporting the resale royalty, introduced HR 11403, the Visual Artists' Residuary Rights Act of 1978. But, after carefully considering both sides of the issue, Congressman Waxman suggested that further study was needed and the bill was not enacted. We hope that the Committee will give careful attention to the practical effects of S.1619. At stake is the real risk of damage to the art market which would result from the enactment of a resale royalty based on an abstract notion of "fairness". Forced profit sharing is essentially unfair and will do more harm than good to the vast majority of artists.

SUPPLEMENTAL STATEMENT OF R. FREDERICK WOOLWORTH IN OPPOSITION TO MANDATORY PROFIT SHARING AND PUBLIC REGISTRATION OF SALES PROVIDED IN S.1619

I am grateful to the Committee for allowing me to supplement my testimony and to provide some additional information which I hope the Committee will find helpful.

Preliminarily, I would like to respond to some statements which were made at the hearing.

1. It was pointed out at the hearing that the Art Dealers Association of America ("ADAA") has approximately 130 members, and that there are approximately 60,000 art dealers in this country. I do not know the source of the latter figure, but to the best of my knowledge the vast majority of those dealers do not represent living artists. Most of them deal in purely decorative works, usually prints and often paintings which are turned out on an assembly-line basis, which are essentially sold to buyers who are not greatly knowledgeable about art. This is an honest and honorable business, but it differs dramatically from the business of ADAA's members, whose clients are in the main knowledgeable about art and who do not acquire art for purely decorative purposes.

Even so, as I have stated, the members of ADAA represent a minority of dealers. But our members, because of their knowledge and experience, have an in-depth knowledge of the market for works by living artists. In a meeting of ADAA's members following the hearing, there was unanimous agreement that the resale provisions of S.1619 and the provisions for mandatory public registration of sales was detrimental to the art market and should be opposed. Telephone calls to members not attending failed to find a single dissent. Communications with non-member dealers and other dealer organizations have been to the same effect. We believe that the views expressed in my testimony reflect the views of the overwhelming majority of knowledgeable and professional art dealers in this country and abroad.

2. It is understandable that many artists and artists' organizations support mandatory resale profit sharing because they believe that artists should share in the profit (but not the loss) on the resale of the small percentage of works of art which can be resold. This issue has created sharp divisions in the art community which are not helpful for either artists or dealers.

Artists are concerned primarily with the making of art. Many artists choose not to involve themselves to any real extent in commercial transactions and consequently are not knowledgeable about the market; these matters are left to their dealers. Dealers assist artists in establishing a career, in bringing the artist's work to the attention of collectors, critics and museums and in promoting the artist's work and reputation. Artists and the dealers who represent them have an important community of interest. We therefore regret that we have been thus far unable to pursuade a number of artists and artists organizations that the resale proposal has not worked where it has been enacted, and will cause damage to the art market and the great majority of artists. We believe that if they understood the situation they would reverse themselves. If ADAA believed that the opposite were true, the proposal would have our support, as do other legislative proposals designed to benefit artists.

3. There was testimony at the hearing from persons who have little or no real, practical experience in the art market to the effect that resale profit sharing and registration o sales will have no adverse effect on the art market and will not inhibit sale of works by less successful artists.

But ADAA believes that dealers know their own business and the art market better than anyone else. Dealers know their clients and their attitudes. Dealers understand the problems in selling works by living artists -- those who are well-known and successful, and those who are not. We know what has happened to the art market and to artists in places where resale profit sharing was mandated by law. ADAA opposes the proposal on the basis of that knowledge.

I now turn to the three questions which have been put to me:

> 1. "To the extent that artists are not adequately compensated for the appreciation in their works, what alternative would you recommend to ensure that they are compensated to some degree when their works increase in value? In your mind, should the collector or owner get the entire benefit of that appreciation?"

I do not accept the premise that artists are not adequately compensated for the appreciation in the value of their work or that the law should compel "adequate compensation." As I have stated in my prior testimony, when an artist's work appreciates in value in the secondary market, works still in the studio as well as works offered by the artist in the primary market also increase in value and in price, and the artist thereby participates in the appreciation. There may be exceptions to the rule, but they are relatively few, and those exceptions do not justify the damage which will be done by mandatory profit sharing and public registration of sales.

As I stated in my testimony, the vast majority -- probably 99% -- of all works of art created in a given year decline in value. We do not believe that artists should be compelled to share in the loss in the case of the 99% of all works of art which decline in value. At the same time they should not share in the profit in the relatively rare case where a work appreciates in value.

2. Many other nations have adopted some form of the French moral rights and resale royalty doctrines. What has been the effect on the art markets in those countries? What would happen to the art market in the U.S. if this were adopted? What effect would it have on artists if there were a decline in the art market in the U.S.

The notion of resale profit sharing, or the droit de suite, originated in France and has been adopted by a number of other countries. In this country, it has been adopted only in California where it was hurriedly manoeuvered through the legislature without any meaningful notice to the art community.

Resale profit sharing has not worked effectively in any jurisdiction in which it has been adopted. Where it has been enacted, it has brought turmoil and evasion; it has impeded the growth of a healthy art market and, as a consequence, has damaged the interests of artists.

From conversations with major California art dealers, who are knowledgeable about the market we have learned that when the resale royalty law was first adopted, there were efforts at evasion through private sales outside the state. The number of contemporary works consigned for public auction in California decreased dramatically. As a result, Sotheby's branch auction house in California, which had become the largest and most important auction house in the area, closed. California was thereby deprived of the presence of a major auction house, which is necessary to the development of a thriving art market. While we have no statistics on the matter, it is widely believed that there was a halt to the growth of the number of new California galleries representing living artists and exhibiting their work.

Over the years, the California market has adjusted to the resale royalty. By and large, the adjustment has taken the form of a widespread disregard of the statute. We are informed that in some cases artists do not seek resale royalties because they fear an adverse impact on the market for their work. In recent years, as the market has adjusted, a number of new galleries showing the work of living artists have opened, especially in the Los Angeles area.

In France, the law requries resale profit sharing with respect to sales at auction and by dealers. The French government, however, has implemented only the part of the law dealing with sales at auction. The once thriving French auction business is now a shadow of what it once was. Very few works which are subject to the law are consigned for auction. There is widespread evasion through private sales, usually abroad. And, largely because of over-regulation, the Paris art market, once the world's most important, has lost its position. Even though the droit de suite has not been applied to private sales, the existence of the law has had a chilling effect on the art market.

There was testimony at the hearing to the effect that the decline in the Paris art market is due to the decline in the French economy in the post-World War II years. But England, which has suffered a worse economic decline than France, and which has not enacted the droit de suite and the other art market regulatory measures adopted in France, has maintained a thriving art market which has grown steadily. Indeed, it can be said that much of the old Paris art market has moved to London.

In Germany, the droite de suite also generally does not work. There was considerable turmoil in the German art market when the law was adopted. As a result, an arrangement was made under which galleries could elect to avoid payment of the droite de suite by making payment of 1% of their total turnover into a social security fund for artists. Many dealers have elected to do this.

We are reliably informed, however, that there is a widespread resistance to the droite de suite by collectors and that payments are avoided through private sales outside the country. We are also informed by our German colleagues that the German droite de suite has had a decided chilling effect on their business. Although we have no detailed information on the German auction business, we know that it is small when compared to auction markets in England and the United States. Very few contemporary works are sold at auction in Germany.

From experience with the droite de suite in California, France, Germany, as well as other countries which have adopted the law certain conclusions can be drawn:

1. The droite de suite has had a chilling effect on the art market wherever it has been adopted.

2. Where the droite de suite is adopted, the result has been turmoil in the art market and efforts to evade payment.

3. No major art center has adopted the droite de suite. It has been rejected in England and repeatedly rejected in New York. To our knowledge, its adoption has never been seriously considered in Switzerland, the other important European art center.

From this experience, there is every reason to believe that the adoption of the droite de suite in this country will have similar effects. We do not wish, however, that our position be misunderstood or exaggerated. There are many dedicated collectors in this country who will continue to collect works by living artists. The market for living artists will not collapse, but there will be damage and the damage will not be small.

This will have a direct effect on artists, particularly younger and less successful artists whose works are the most difficult to sell. Many exhibitions of those works are now subsidized, in effect, by dealers. This subsidation will become more difficult. Not infrequently, sales of three to six works by an artist can make a major difference in the artist's income in a given year. Even a small decline in the art market will have an adverse effect on many artists.

The sale of art, particularly difficult works or works by artists who are not well known, is a difficult business. Art is not a necessity; it is acquired with discretionary funds. Dealing in works by contemporary artists is a highly risky business. ADAA requires that a prospective member be in business for at least five years. This requirement was established because we are aware that more than 75% of New York galleries which specialize in contemporary art do not survive for five years. The adoption of the droite de suite will add to the problems of those dealers; it makes it more difficult for them to stay in business and will consequently result in lessened opportunities for artists to exhibit and sell.

Artists are able to support themselves and to continue to create through the continued sale of their works. In order to sell art it is necessary to have a healthy art market. Wherever it has been adopted, the droite de suite has inhibited the sale of works or art and has worked against the interests of most artists.

3. What effect would adoption of this bill have on the established doctrines of "Work for Hire?" Would this effect discourage or encourage artistic production in general?

We do not have sufficient information to respond to the "Work for Hire" question. It has been urged, however, that the adoption of the droite de suite will provide an incentive for artists to create. This a ludicrous argument. There is no evidence that the droite de suite has been an incentive to creativity by artists in any jurisdiction in which it has been adopted. Moreover, serious artists create because of a felt need and not because of any legislation. For more than 200 years, American artists have created great works of art in the absence of droite de suite. They will continue to create whether or not this law is adopted.

There are affirmative steps which can and should be taken by the Congress to assist artists. For example, artists should be exempted from the application of the uniform capitalization rules in the Internal Revenue Code. They should be allowed a full tax deduction for the fair market value of any of their works which they donate to a museum or other charitable institution. We also believe that the tax on the sale of a work of art should be deferred if the collector re-invests the funds in one or more works by a living American artist. This provisions would give collectors an additional meaningful incentive to acquire works by living artists, and would be a great benefit to those artists.

ADAA has prepared a statement on legislation affecting the visual arts which incorporates these proposals and opposes mandatory profit sharing and public registration of sales. We have asked artists and dealers who agree with the Statement to subscribe to it and, in the very short time available, a number of important artists and dealers have done so. We expect the list to grow.

It is important that the Committee knows that there is serious and widespread opposition to the resale provisions of S.1619 throughout the art community.

Senator KENNEDY. Well, I don't think I will be affected with this particular legislation, in whatever form it comes out. [Laughter.]

Mr. Woolworth, you make a considerable emphasis, in your comments, about representing the interests of the artists. The various organizations that I mentioned earlier in the hearing that represent artists reach an entirely different or, at least, substantially different conclusion. Your testimony is really representing the dealers, isn't it?

Mr. WOOLWORTH. Yes, that is correct.

Senator KENNEDY. So, I mean, for the record, we ought to understand that. I mean——

Mr. WOOLWORTH. And, Mr. Chairman, I am also representing many collectors and artists that I have talked to.

Senator KENNEDY. Yes. Well, why are the collectors opposed to it?

Mr. WOOLWORTH. Why the collectors?

Senator KENNEDY. Yes.

Mr. WOOLWORTH. The privacy alone is so important to their mode of collecting that, believe me, it would turn off the spigot or chill or dampen to such an effect that it would be noticeably seen.

Senator KENNEDY. We are glad to work with you on meaningful suggestions relating to the privacy issue.

Mr. WOOLWORTH. I would very much like to submit a written——

Senator KENNEDY. I don't think that that is really the major hindrance.

You represent in your testimony that the ADAA comprises 130 members across the country?

Mr. WOOLWORTH. That is correct.

Senator KENNEDY. And the Library of Congress advised me that there are approximately 61,000 art dealers and 16,000 art galleries in the United States. Do those figures coincide with your numbers on the size of the art dealer and gallery market?

Mr. WOOLWORTH. Oh, traveling up and down Madison Avenue, the names of art dealers seem to change on a weekly basis. It would be hard for me to keep up a count.

Senator KENNEDY. But, actually your membership, as you mentioned yourself, is a relatively small portion of the market.

Mr. WOOLWORTH. A small portion, but represents the leading element within the art community who represent a tremendous quantity of these successful and hopefully to be successful artists.

Senator KENNEDY. What was the impact on the market after implementation of a buyer's premium in auction houses in the 1970's? What was the impact on the market?

Mr. WOOLWORTH. Oh, I believe for many months there was talk that there was going to be a great deal of damage. I think that was mainly a decision on the part of the dealers. There could be some jealousy between dealers and auction houses. You have to remember there are many ways to skin a cat, and the art premium has not been the problem that a lot of people thought it was going to be.

But when you put 7 percent on top of 8¼ percent New York sales tax and city tax and State tax, then you are going to have collectors thinking in a completely different manner. There are many other ways for them to collect art. They can go to London on the Concorde in 3 hours and 15 minutes and purchase art.

Senator **Kennedy**. Well, I am just interested to know, because I am learning through this whole experience. If they had a 10-percent premium imposed on the full sale price in 1974 with virtually no impact, why would a 7 percent on the appreciation be so devastating to the art world? Why is there going to be such an adverse impact in the art market?

Mr. **Woolworth**. I would like to let the next witness, the president of an auction house, answer to that. I feel he is much more knowledgeable on that than I.

Senator **Kennedy**. OK. What is your general assessment of the market itself in art? It is pretty strong today.

Mr. **Woolworth**. The art market I would say in the last 5 years has been very, very healthy. I am extremely concerned with the recent economic turn, that where yes, we have all been, who have been related within the art industry, have had some wonderful years, we have had plenty of lean years. I can see a tightening of the belt coming up again. This, if it happens, means the less successful artists will feel the pinch first.

Senator **Kennedy**. More people are going into museums, more people are going into galleries than ever before.

Mr. **Woolworth**. No question, no question. I can remember when I was a boy in New York, I roller skated in the Metropolitan Museum. [Laughter.]

Senator **Kennedy**. Well, on that interesting note——

Mr. **Woolworth**. There were only about two guards.

Senator **Kennedy** [continuing]. Thank you very much, Mr. Woolworth. We are glad to have you here.

Mr. **Woolworth**. Thank you, Mr. Chairman.

Senator **Kennedy**. Our final panel: Schuyler Chapin, chairman of the Independent Committee on Arts Policy, New York; and Michael Ainslie, Sotheby's Holding Co.

Mr. Chapin, we will start off with you.

STATEMENT OF SCHUYLER CHAPIN, CHAIRMAN, INDEPENDENT COMMITTEE ON ARTS POLICY

Mr. **Chapin**. Thank you, Senator Kennedy.

First, my name is Schuyler Chapin. I am Dean Emeritus of the School of the Arts at Columbia University and the former general manager of the Metropolitan Opera.

I come today to testify as the chairman of the Independent Committee on Arts Policy, a group that has 30 members, including artists, a museum director, writers of prose and poetry, playwrights, funders and arts administrators. This organization was created as a result of a speech made 5 years ago by Professor Arthur Schlesinger at the American Academy and Institute of Arts and Letters. As a group, we try to do something about the low priorities that the arts generally have on the American agenda.

I don't propose, sir, to read the formal statement that we have submitted. That was an "op ed" piece that appeared in the October 29 issue of the New York Times. The article stirred a lively response. A group of letters about it were published on November 12, and then on Saturday, November 29. Another "op ed" piece appeared with different thoughts on the subject.

I would like to make a couple of points, and one of them is apropos of what the two artists have said this morning. Degas, when he saw one of his pictures auctioned for an enormous sum of money, was asked how he felt watching the process. He said, "I feel like the winning horse when the silver cup is given to the jockey."

Our society is designed to reward excellence and achievement, and in the view of the Independent Committee it is high time that the visual artists, who have been left out of that formula, are firmly recognized. Senate bill 1619 moves in that direction in an extraordinarily strong and positive manner. The moral rights clause, which seems to be the one part of the bill acceptable to all the witnesses this morning, is perhaps as important as actual money. The copyright problem, of course, and its recognition needs no further comment.

The resale royalty provision of the bill, which causes the controversy, much of which we have heard presented by distinguished people this morning, may need a reworking of the particulars, which will be spurred by testimony before this committee, and other testimonies and solicitations that you will undoubtedly ask for. But I would like to state the moral importance of this resale royalty. To do this, I want to cite the example that you touched upon briefly when you mentioned ASCAP and BMI.

I think we are apt to forget that until the formation of ASCAP, which as most of you know is the American Society of Composers, Authors and Publishers, a songwriter sold his song to a publisher for a flat sum of money, and the song could be used any way that the publisher desired. This problem became extremely important, when vast amounts of money were being made from performances, without further compensation to the composer. ASCAP, created by the professionals in the field, brought order into this area, and later, added stability was achieved with the formation of BMI, a parallel organization.

The independent committee suggests that something between what is proposed in the bill as you now have it for resale royalties and the ASCAP/BMI formula will emerge, so that the fundamental purpose this part of the bill is representing will be met. It is patently wrong for the artist to be left out of the collective economic pie.

One further comment, if I might, sir. One of the most flagrant examples of a lack of attention to this kind of detail for a creative artist happened to one of the most distinguished composers of the 20th century, Igor Stravinsky, whose three major works—the Firebird, Sacre du Printemps and Petrushka—were copyrighted in Imperial Russia and France. With the Russian Revolution, that copyright was no longer recognized, and France ignored the international copyright until the twenties. Therefore, Stravinsky never received anything close to the amount of money that he was entitled to from these seminal works.

Noting your earlier quote from Katherine Ann Porter, let me close with one written by Sister Mary Madeleva, once president of St. Mary's College in Notre Dame. She said it very simply: "Art is the signature of man."

Thank you, sir.

[The prepared statement of Mr. Chapin, with attachment, follows:]

INDEPENDENT COMMITTEE ON ARTS POLICY
330 WEST 58 STREET SUITE 6G NEW YORK, NY 10019

VISUAL ARTISTS RIGHTS

by Schuyler Chapin and Alberta Arthurs

(Mr. Chapin is Chairman and Ms. Arthurs is President of the Independent Committee on Arts Policy, a group of artists and arts leaders that examines arts policy issues.)

Last fall, Jasper John's painting "Out the Window" was auctioned for $3.6 million, the highest sum ever paid for a work by a living artist. The painting had been acquired in 1960 for $2,250. None of the $3.6 million went to the artist.

A private collector purchased a work by sculptor George Segal: two figures lying on a bed with soiled sheets. The buyer subsequently removed the figures from the bed and placed them on a pedestal instead. The buyer ignored all letters from the sculptor protesting this mutilation, including one in which Segal offered to buy the piece back.

Both of these stories reflect something unique to the visual arts as compared with other arts. Because these works of art are original, ownable pieces of property, there is a complete severing of the artist's connection to his or her work once it is sold. In this country, the right of private property takes precedence over artists' moral or economic rights.

Senator Edward Kennedy has initiated a bill that has been introduced in both houses of Congress that maintains a connection between a visual artist and that artist's work. This connection is one which we already recognize with reproducible works of art and is central to the incentive and protection we as a society grant to artists.

Called the Visual Artists Rights Act of 1987, the bill has two primary objectives: to secure the rights of visual artists to prevent the intentional mutilation or destruction of their work and to provide for resale royalties.

This simple and rather modest bill elicits impassioned arguments. It requires a fundamental examination of attitudes our society holds about the nature of art; whom it benefits, what its value is, and what value we place on those who create it. From this broader perspective, the Visual Artists Rights Act is a very important piece of legislation and its passage could be a milestone in the cultural maturation of America.

The Independent Committee on Arts Policy, a group of artists and arts leaders, examined this bill and the detailed arguments pro and con. Our conclusion, to support the bill, came after rigorous debate and analysis.

Art --- physical, tangible, visual art --- is more than a piece of property that some one or some institution owns. And yes, it is even more than a valuable commodity with one of the highest rates of return on the market. Works of art are much, much more than that and in some real way they belong to no one because they belong to all of us. They are amongst our most salient examples of the breadth and depth and complexity of human nature. Our species throughout time has used the arts --- this richer set of symbols that only humans have devised --- to transmit the heritage of people and to express most profoundly their deepest human joys, sorrows and intuitions., "Art," Elliot Eisner has said, "helps us know what we cannot articulate."

And so, this bill says that as a society, we want the owners of art to protect what they have for all of us and for posterity. We don't want owners to intentionally, or through gross negligence, mutilate or destroy what they own. We don't want Blue Cross-Blue Shield, for example, to paint John Raimondi's red sculpture, "Blue Cross blue."

This bill says we value the vision of the artist. It says that those gifted with the insight, imagination and inventiveness to create fine art are due recognition and protection from the highest levels of Congress.

And because we as a society value artists and value what they do, when their works command handsome prices on the resale market, we think it only fair that some small portion of that profit return to the originator, the creator, the artist.

Antagonists to this bill say that the thriving art resale market, known to be in the billions (Sotheby's recently announced record worldwide sales of $1.3 billion. Christie's sales were just short of another billion) is so delicate that an artist royalty would be a significant deterrent to trade, thereby hurting artists not helping them. Investors will be, opponents say, so repelled by the added cost that they would buy and sell outside the U.S. or "go underground."

Although it is no surprise that to hear these kind of comments, the truth is the 1987 Kennedy bill is a very reasonable proposal. The artist would be entitled to 7% of the appreciated value, provided that the resale price is more than 150% of the original price and the work cost more than $1,000 to begin with.

There are many indicators that belie the "delicacy of the market" argument. Investors have not balked, for example, at the 10% buyers premium imposed by auction houses. And New York City has continued to be the art commerce capital of the world, despite our whopping sales tax of 8.25%.

The issue is something larger than marketplace friction. It has to do with that connection between artists and their work that we as a society want to recognize. It has to do with knowing that the artist is the indispensable element here. And it has to do with a kind of elemental fairness intrinsic to our American values.

Ideas, even good ideas, without tenacious support have a hard time surviving. The Independent Committee on Arts Policy tenaciously supports and endorses this bill, applauds the senators and representatives who are working for its passage and urges Americans to recognize its vital importance.

INDEPENDENT COMMITTEE ON ARTS POLICY
330 WEST 58 STREET SUITE 6G NEW YORK, NY 10019

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Senator **Kennedy**. Thank you very much.

Mr. Ainslie?

STATEMENT OF MICHAEL L. AINSLIE, PRESIDENT AND CHIEF EXECUTIVE OFFICER OF SOTHEBY'S HOLDINGS, INC.

Mr. **Ainslie**. Mr. Chairman, first let me offer my written testimony for the record.

Senator **Kennedy**. Fine. It will be printed in its entirety.

Mr. **Ainslie**. Thank you, sir.

I would like to speak to some of the points that have been raised this morning, but first let me say that having labored long and hard with you and other members of this and other committees during my time as president of the National Trust for Historic Preservation from 1980 to 1984, I most heartily endorse and support the moral rights portion of the legislation, with some concerns, legitimate concerns of museums and their curatorial staff with methods of implementation.

I must say, however, that on behalf of our firm, we do oppose the resale royalty provision. You spoke earlier of one's self-interest. Clearly it is in Sotheby's self-interest to stimulate contemporary art in America and elsewhere in the world. There are no more Degas being produced, that we want to sell, at least, and our future rests with the success of contemporary artists and their creativity and productivity.

Sotheby's is frequently misunderstood in the press; $54 million paintings get the headlines. In fact, the average transaction at Sotheby's is $4,500. In excess of 200,000 of those transactions occurred in this past year. We are, immodestly, the leading market maker for art in the world, with some 12 auction centers and 25 countries in which we do business.

There has been enormous growth in the field of collecting of works of art in recent years, and we have a great deal of pride in having brought about much of that growth, we feel. The United States has been perhaps the center of that growth, but let me look back not many years when Paris and London were the centers of the world of art. Today New York and the rest of the United States, because it is by no means a New York phenomenon, have caught up with London as a second primary center.

The reasons for that, in my view, are the fact that the United States and the United Kingdom are the two, and perhaps only two, largely unregulated art markets in the world. France has fallen from preeminence. Certainly I would not blame it entirely on the "droit de suite" legislation, but upon that and a number of other regulations that the Government there has imposed.

Let me speak for a moment to the fragility of art markets in what is increasingly a international art community. These markets are fragile and increasingly and intensely competitive. Art is portable, as is obvious.

From your home State and city, Boston, came a major painting last year, just in the fall of 1986, a major Rembrandt that the seller, the family, chose to sell through our firm. We recommended that they sell that painting in New York in January of this year. They chose, with very short notice and very short time to communicate its availability to the world, to sell it in London in December of last year. They publicly stated the reason was an 8 percent differential in capital gains tax. They sold the painting successfully in London but we, as I say, recommended that the painting be sold in New York.

Let me speak to California for a moment. We have been discussed as having left California with our auction sales following the introduction of the Resale Royalty Act in that State some 10 years ago. Without question, consignors of contemporary works of art, immediately following that legislation, dramatically decreased——

Senator KENNEDY. Can I just retreat? I was just consulting staff—I would think they would have some trouble with the IRS with that sale, if it was their sole purpose to circumvent the American tax law and repatriating those funds. I am not a tax expert.

Mr. AINSLIE. The only issue was the timing of the sale, to the seller, and the capital gains law changed on January 1. If they chose to sell the painting in a legitimate——

Senator KENNEDY. Oh, I understand that. I understand the change of the law, and they want to deal with those particular provisions, but did they repatriate the——

Mr. AINSLIE. Absolutely. I said an 8-percent differential. They presumably paid tax of 20 percent instead of 28 percent.

With regard to the California situation and Sotheby's, it is true that some several years ago we closed our auction facility, and again one of the reasons—not the only reason—was the dramatic decline in consignors' choice to sell contemporary art in the State of California which coincided with the passage of the 5-percent resale royalty in that State.

Let me turn to another market that has recently had a change in regulation. We have worked with the arts community in the country of Spain for the last several years to create a viable public market, and frankly with great success. Last year the Spanish revenue authorities required that all sales of works of art by public auction houses, that we immediately provide to them the names, addresses, and selling prices of works of art. We have seen the market completely vanish. Sotheby's is considering at the moment closing its Spanish auction operations because no one will sell at public auction in Spain today.

These markets are fragile. They are choices of individuals and they are motivated by their views of legislation.

We feel that, as has been said, that this legislation is discriminatory. It discriminates against the large number of artists who do not see appreciation in the prices of their works of art. It has been pointed out, the large prices that are brought by contemporary artists. In fact, there are only approximately 50 artists who have a resale market at auction today—excuse me, 50 living artists who have a resale market in the auction market. We regularly, I think importantly, sell works of art for those artists from their personal collections, and in that way, as has been pointed out, provide them an opportunity to access that market as well.

I think, in closing, that there are other things that can be done to in fact encourage collecting of works of art and encourage the production, the creative production of works of art. We are very supportive of the idea of allowing artists to deduct the true value of their works, as opposed to the cost of the materials, when they are donated to museums and other nonprofit institutions.

Finally, we think there should be consideration to allowing sellers to roll over the gain on their sale of works in art if it is invested in other works of art within a specified time frame. These, we think, are the kinds of legislative initiatives that would in fact stimulate the art market and would in fact benefit contemporary artists.

Before I close, let me speak for a moment about the buyer's premium. I am certainly aware that that has been discussed and that you have an interest in that, the economics of that aspect of our business. It is true that in 1974 a 10-percent buyer's premium was introduced into the auction business and has remained in place through the last 13 years. What has not been said is that prior to that introduction, the seller's commission—the cost to a seller of selling a work of art—was in the range of 15 to 20 percent.

In fact, it was through erosion of that commission structure, as art became more and more in demand throughout the world and fewer and fewer works of art were available, so that the seller had more leverage in negotiating his selling commission, that that commission had come down to the point that the auction houses frankly in the early seventies were almost—in fact, Sotheby's I think had a year of losing money. There was thus a change in the economics. There was a 10-percent buyer's premium put in place, and the 15- to 20-percent seller's commission was restated as a 10-percent seller's commission which is negotiable.

In many cases, in fact in virtually every case of a major work of art selling for anywhere in the several hundreds of thousands of dollars, that seller's commission is way below 10 percent and frequently zero. That is because of the competitiveness of the auction market, so that the implication that the 10-percent premium was simply an add-on to the cost of the transaction is not the case. In fact, if one wants to look at our public filing with the SEC which occurred some weeks ago, one would see that the average commission on all of our transactions worldwide is in the range of 16.5 percent, meaning 10 percent from the buyer and roughly 6.5 percent from the seller, so it is not our view that the implication that a buyer's premium was simply profit to the auction house is an accurate one.

[The prepared statement of Mr. Ainslie and questions and answers, subsequently received for the record, follow:]

SOTHEBY'S
FOUNDED 1744

December 3, 1987

Summary of Remarks of
Michael L. Ainslie
President and Chief Executive Officer of Sotheby's Holdings, Inc.
before the Senate Judiciary Subcommittee
on Patents, Copyrights and Trademarks
Regarding S.1619, the Visual
Artists Rights Act of 1987

Sotheby's is the world's largest fine art auctioneer, with international sales for the year ended August 31, 1987 of $1.3 billion.

There are many reasons why a 7% resale royalty will be harmful to artists and the art market in this country. In the last decade, sales of art in the United States have grown to the point where we believe the multi-billion dollar volume rivals that in Europe. This has happened in large part because our free market encourages transactions of this sort. A thriving art market supports and encourages producing artists; a heavily taxed and regulated market does not.

Other countries which have enacted resale royalties are not known for their lively art markets. In 1977, a special committee of the House of Commons in the United Kingdom reviewed the effects of droit de suite legislation in other countries and concluded that similar legislation should not be adopted in the U.K. We who are involved in the United Staets art market know that we cannot afford to adopt legislation which will cause substantial erosion in the gains we have made in this intensely competitive world market.

Sotheby's is completely supportive of legislation that will benefit artists and the entire art community. The resale royalty provisions of S.1619 are counterproductive to the Bill's well-intentioned aim of helping artists.

SOTHEBY'S
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MICHAEL L. AINSLIE

President and Chief Executive Officer
Sotheby's Holdings, Inc.

Michael L. Ainslie is President and Chief Executive Officer of Sotheby's Holdings, Inc., the parent company of Sotheby's worldwide auction and real estate operations. In this capacity he oversees Sotheby's three operating auction companies: Sotheby's North America, Sotheby's U.K., and Sotheby's International, as well as Sotheby's International Realty Company. He joined Sotheby's in July 1984.

Michael Ainslie's professional background in corporate management, public service, and real estate development includes not only a strong commitment to the arts, but also to preservation, community planning and development. As President of The National Trust for Historic Preservation, in Washington, D.C., he directed the Trust in expanding its private funding base, strengthening federal tax laws encouraging building rehabilitation, and increasing the involvement of the American public in preservation. During his tenure at the Trust from 1980-1984, he focused not only on preserving America's historic monuments, but on making preservation a tool for low-income historic neighborhoods to revitalize themselves and to provide affordable housing. To further this goal, he established The Inner City Ventures Fund, which provided venture capital for the rehabilitation of inner-city neighborhoods. Prior to joining the Trust, Mr. Ainslie had been Chief Operating Officer of an industrial manufacturing concern in Cincinnati.

Mr. Ainslie's interests in cities, in quality of design, and in development have been apparent throughout his career. In the late 1960's, as Deputy Director of New York City's Model Cities Administration, he worked on the redevelopment of housing in the Bedford Stuyvesant neighborhood of Brooklyn. Later, as President of Palmas del Mar, a subsidiary of Sea Pines Company, Inc., Hilton Head, S.C., he developed a residential and resort community in Puerto Rico, which was recognized for its standards of excellence and design in community planning.

Mr. Ainslie, a native of Kingsport, Tennessee, holds an M.B.A. from the Harvard Business School, where he was a J. Spencer Love Fellow, and a B.A. degree in Economics from Vanderbilt University. Prior to Harvard, he studied economic development in Europe, Africa and Asia, as a Corning Foundation World Travel Fellow. After he was awarded his M.B.A., he spent three years at McKinsey and Company, the management consulting firm, in New York City.

Michael Ainslie is a member of the Board of Overseers of the Graduate School of Fine Arts of the University of Pennsylvania, a member of The National Trust's Pocantico Advisory Board overseeing the planning for the future of the Rockefeller property, a member of the Alumni Board of Vanderbilt University, a member of the Board of the University of Virginia's Jeffersonian Restoration Advisory Board, and a Board Member of the New York Landmarks Conservancy.

1/31/86

Statement of Michael L. Ainslie
President and Chief Executive Officer of Sotheby's Holdings, Inc.
before the Senate Judiciary Subcommittee
on Patents, Copyrights and Trademarks
Hearings on S.1619
December 3, 1987

Mr. Chairman, my name is Michael Ainslie, and I am President and Chief Executive Officer of Sotheby's Holdings, Inc. Sotheby's is the world's largest auctioneer of works of art. Our sales for the 12 months ended August 31, 1987 were $1.3 billion and consisted of over 200,000 separate sales of works of art.

We accept works of art on consignment, promote their sale to the world market and earn a commission based on the hammer price at auction. Our principal sales rooms are in New York and London, and we have other auction centers and representative offices in twenty-five countries around the world.

Over the last decade, the U.S. has caught up with London as one of the two preeminent centers of the world art market. While New York City is the center of the art business in this country, there are thriving auction houses and dealers in many of our major cities, including Washington.

We estimate that sales of important works of art by auction houses and art dealers are approximately $2 billion annually in New York alone. Sellers and buyers come not only from this country but from around the world to participate in the free market here, and this activity in turn generates hundreds of millions of dollars of sales and income tax revenue as well as revenue for airlines, hotels and restaurants.

All of this is to put my remarks in context. There are abundant reasons why a 7% resale royalty will be harmful to the interests of artists and the art market in this country. Others are perhaps better qualified to testify as to the negative impact such a gains tax will have on colllectors' willingness to invest in recently created works of art; to the fact that a resale royalty will tend to benefit established, already successful artists and the heirs of long-deceased artists at the expense of younger artists attempting to establish themselves; to the impracticality and unenforceability of such a tax; to the fact that the tax is not really necessary, since as artists mature and become successful, resales by subsequent owners of the artists' earlier art -- particularly public sales at auction -- establish higher prices for artists' unsold inventory and future original works sold by the artist; and to the lack of fairness and reciprocity in a royalty which artists do not have to pay to collectors whose purchases diminish in value.

The point that I as the head of the leading auction house particularly wish to emphasize is that art is portable and the art market is global in scope and intensely competitive. Time and again, we have seen prospective sellers select a sale location based on tax or commission differences of 7% or 8% or less. I can tell you unequivocally that collectors who have a choice of selling in a jurisdiction without a resale royalty will elect to do so, other things being equal.

Droit de suite legislation was first passed by France in 1920 and has since been enacted by Algeria, Brazil, Chile, Luxembourg, Norway, Portugal, Tunisia, Turkey, Belgium, Czechoslovakia, Poland, Uruguay, Italy, West Germany and Moroco. None of these countries is today known for its thriving contemporary art market.

A special committee of the House of Commons in England chaired by Justice Whitford in 1977 undertook a review of copyright laws around the world, including droit de suite legislation in order to make a recommendation as to whether a provision similar to the one in S.1619 should be adopted. I would like to read you its conclusion regarding droit de suite:

"Having considered all the [relevant] matters . . . we find ourselves unable to recommend the introduction of droit de suite in this country. Our view is that it is not necessarily fair or logical and that the main lesson to be drawn from the experience abroad is that droit de suite is just not practical either from the point of view of administration or as a source of income to individual artists and their heirs."

My colleagues in Europe also report that the practical experience of West Germany with their droit de suite law is that the cost and administrative burdens of collection greatly exceed the revenue collected. The administrative burden on collectors, museums, dealers and auction houses will be substantial as well. We also understand that the relevant authorities in Italy, Germany and Belgium are recommending the abolition of _droit de suite_ legislation in those countries.

We know from California's experience with a 5% resale royalty introduced a decade ago that compliance is virtually nonexistent. The agency in charge of collecting royalty payments when sellers are unable to locate artists has stated that it has collected only about $15,000 since the royalty went into effect.

Our views do not, of course, reflect our commercial self-interest as market-makers. No business welcomes the notion of an additional tax, let alone a unique gains tax applicable solely to that business, and a tax which does not exist in principal competing jurisdictions.

Quite apart from our commercial concern, however, we believe that as well-intentioned as the resale royalty may be, it simply will not achieve its stated purpose of helping and rewarding artists. The compelling empirical evidence of other jurisdictions' experience tells us that the royalty is uncollectable, drives business underground or abroad, and invites non-compliance or fraud. Common sense and economic analysis tell us that a resale royalty will depress the market for works of art. As a firm which depends on the continuing creation of contemporary art to provide paintings, prints and sculpture for a major area of our business, we strongly favor measures that will stimulate artistic production. Our sales of contemporary art in the U.S. have grown from $2,900,000 in 1980 to $52,000,000 this year. Accordingly, we will always support a national policy that encourages the creation of art and benefits visual artists.

The problem with the resale royalty is that it produces exactly the opposite effect by depressing the market for art. To quote from a leading authority on droit de suite legislation, "The most serious economic problem facing most contemporary artists is the lack of any broad initial market for their work . . . What would benefit these artists most is an increase in the funds available to purchase works of art. This is the basic flaw in the resale royalty. It does not seek to increase the funds [but] by imposing a discriminatory tax on contemporary art, it would reduce such funds." [Stephen E. Weil, "Resale Royalties: Nobody Benefits", 1978] There are already ample costs and taxes built into collecting art. For a seller in New York City, the proposed 7% gains tax would be in addition to the dealer's or auction house's commission and expenses, the costs of having insured (and perhaps having conserved) the art, and state and local income tax on the gain in value.

There exist other legislative possibilities that will better serve the valid purposes of S.1619. These include permitting artists who donate works of art to qualified charities to take a fair market value income tax deduction, and permitting collectors to roll over the gain on a sale of art if they use the proceeds to purchase additional art, much as we are now permitted to do when we sell our principal residence. Such provision might well encourage collectors to explore new and untested artists, thereby having precisely the effect that proponents of S.1619 advocate.

I would like to close by quoting from a statement made by Representative Henry Waxman in 1978, when he introduced a 5% resale royalty bill: "The benefits to be gained by visual artists by Congressional recognition and enactment of royalties for them may be outweighed by the harm done the art market by virtue of their implementation."

It is simple logic that what harms the art market is not helpful to artists. Representative Waxman's concern is shared by all of us in the market, and I would urge all of you to give serious consideration to both the adverse and counterproductive consequences of a national resale royalty and to legislative alternatives which will benefit the entire art community -- artists, collectors, dealers and auctioneers.

Mr. Chairman, I understand that the record will be held open for another two weeks, and I therefore request that we be permitted to submit within that period supporting documents and correspondence from interested parties.

SOTHEBY'S
FOUNDED 1744

1334 York Avenue, New York, New York 10021
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Michael L. Ainslie
President and Chief Executive Officer
Sotheby's Holdings, Inc

December 23, 1987

Senator Dennis DeConcini,
Chairman, Subcommittee on Patents,
Copyrights and Trademarks
Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Senator DeConcini:

Thank you for affording me the opportunity to have testified at the Visual Artists Rights Act of 1987 (S.1619) hearing on December 3rd.

I am writing in response to the questions posed in your letter of December 9, 1987.

1. Q. To the extent that artists are not adequately compensated for the appreciation in their works, what alternative would you recommend to ensure that they are compensated to some degree when their works increase in value? In your mind, should the collector or owner get the entire benefit of that appreciation?

A. There is no question that the vast majority of newly created works of art decrease in value, and that in many instances there is no resale market for new works of art. Relatively speaking, only an extremely small number of artists create works which increase in value and enjoy a resale market. By its own terms, S.1619 will benefit only this tiny minority of artists, while creating a disincentive to collectors to invest in contemporary art.

Those artists whose works increase in value presently have available to them two very effective means of benefitting from increases in value. The first is their bargaining position with dealers and collectors. If their works are viewed as sound investments likely to increase in value, these artists may bargain for a contract provision that will give them a stipulated percentage of any increases in value achieved on a resale by the person who bought the painting in the first place. Bargained-for compensation is consistent with our free market system and will not create a disincentive to investment in works of artists viewed as speculative.

A more significant way in which artists benefit from increases in value is by holding back works and by creating new works once their market is established by collectors who pay increasing prices for the artists' works. An artist may sell works for relatively nominal amounts at early stages of his or her career. If the market subsequently increases for that artist, he or she can sell held-back or new works at the higher price level. In this way, artists whose works increase in value indisputably derive economic benefit from the market. An imposed royalty would be not only superfluous but damaging to the extent it discourages investment.

There is no question in my mind that the collector or owner of a work which increases in value should obtain the entire benefit of that appreciation unless he has agreed by contract to pay part of it to the artist. The collector takes the entire economic risk when he acquires the work of art and has to bear the transaction expenses, insurance, conservation and restoration costs, and federal and state income taxes on any gain (without any tax benefit for a loss). As a matter of equity, why should all the risk be imposed on one party, but the reward be shared? So long as an artist has retained any works, or can create new works, collectors (whose purchases establish the increase in value) never get the "entire benefit" of appreciation. The artist obviously benefits from the increase in value. At the time of the often-cited 1973 auction of Robert Rauschenberg's painting for the then spectacular price of $85,000 in the Scull sale, it is reported that someone remarked that the "sale made Rauschenberg a millionaire" because it established a new price level for the artist's existing and future works. This is a market benefit that causes no harm, unlike the resale royalty.

2. Q. Many other nations have adopted some form of the French moral rights and resale royalty doctrines. What has been the effect on the art markets in those countries? What would happen to the art market in the U.S. if this were adopted? What effect would it have on artists if there were a decline in the art market in the U.S.?

A. As I stated in my testimony, those twenty or so civil law countries which have resale royalties do not have thriving contemporary art markets, a major cause for which has to be the royalty. The House of Commons in the U.K. conducted a study of other countries' resale royalty in 1977 and conclusively rejected it, as have a majority of other European nations. According to Professor John Merryman of Stanford Law School, California is the only common law jurisdiction to have adopted it. Although similar bills have been introduced in several other states (including New York), none have adopted the resale royalty. I would also note that the California agency to which the 5% royalty is to be submitted if the seller cannot locate the artist reports that it has only collected $15,000 in the decade subsequent to the enactment of the royalty there. One can only conclude that the California statute is being widely ignored, which says something about the substantial impracticalities, if not inherent flaws, of the resale royalty concept.

As President of the world's largest reseller of works of art, I can tell you that we have on many occasions witnessed decisions regarding the venue of substantial transactions turn on amounts of money of 7% or less. There is absolutely no question that, other things being equal, a seller with a choice of place of sale will send his work of art to a jurisdiction which does not impose the resale royalty. In the last decade the United States has achieved parity with the United Kingdom as a major art market. If a resale royalty is imposed here, it will have a profoundly negative effect on our position in this highly mobile, highly competitive multibillion dollar market.

At a time in our economic history when the United States has become the world's largest debtor nation and is striving to restore its competitive role, it strikes us as inconceivable that Congress would want to enact a gains tax to benefit at most a few hundred artists at the expense not only of the vast majority of our artists but a domestic service industry that has grown so dramatically in the last few years.

Nothing benefits artists more than a thriving, healthy resale market which attracts new investment, and nothing would hurt that market more than a new gains tax on top of existing federal and local gains taxes. Simple common sense tells us that the more collectors are willing to invest in works of art, the more demand there will be, and the more demand there is, the easier it is for artists to earn a livelihood. That is why anyone who looks beyond the superficial appeal of the resale royalty concludes that it is an exceedingly elitist proposal which will harm the great majority of artists by damaging the market for their works.

3. Q. "What effect would adoption of this bill have on the established doctrines of "work for hire?" Would this effect discourage or encourage artistic production in general?"

A. We have not considered the "work for hire" doctrine of copyright law because it is not applicable in our business; I simply am not qualified to respond to this question.

Thank you for permitting me to present our views regarding S.1619.

Sincerely,

Michael L. Ainslie / MZ
Michael L. Ainslie

MLA:pmc

Senator KENNEDY. It was 10 percent from the buyer, wasn't it? In any event, it constituted an added cost for the buyer?

Mr. AINSLIE. The issue is the total cost of the transaction. What is the commission that is being charged. Presumably the buyer was paying the costs of the auction house operations and profits previously, which as I said were at a higher percentage to the seller; so no, I don't think it resulted in higher prices to the buyer.

Senator KENNEDY. Well, let me ask you a blunt question: Do you think artists have any continuing financial interest whatsoever or, in their work, that they should have any continuing financial interest in their art after the day that they sell it?

Mr. AINSLIE. If they have negotiated such with the buyer, I do. If they don't, I do not think they should.

Senator KENNEDY. But it is unrealistic to think that they are going to be able to negotiate very much with the buyer, isn't it?

Mr. AINSLIE. It is certainly not an easy negotiation, but many are successfully done.

Senator KENNEDY. But otherwise they don't. You feel that once they sell it—once you get a young artist who sold a work for $1,000—that they do not nor should not merit recognition or any kind of financial incentive. Is that your position?

Mr. AINSLIE. No, that is not my position.

Senator KENNEDY. What is your position, then.

Mr. AINSLIE. They certainly should get the recognition for their sale.

Senator KENNEDY. All right, so they get a recognition. Then let me limit it just to the financial involvement.

Mr. AINSLIE. Right.

Senator KENNEDY. They are finished, then, if their art appreciates, even as hundreds of thousands and millions of dollars may be made by dealers and others. Your testimony is that the artist should get nothing.

Mr. AINSLIE. No. My testimony is that this will discourage the buying of art.

Senator KENNEDY. I am not asking you about this bill. I am asking about something else as a matter of concept. What is your gut feeling? Do you think they should be in, or should they be out? I want to know what your own feeling is.

Mr. AINSLIE. Let me answer it in the context of Mr. Mangold's earlier——

Senator KENNEDY. Just answer my question. Can't you answer it? Just give me a straight answer on it?

Mr. AINSLIE. I do not think that the artist should have a percentage interest in works of art that he has sold, without that as part of the contract of sale.

Senator KENNEDY. So, therefore, the answer is no, they shouldn't, unless they have been able to work out some contract—unless the young artist is able to negotiate a contract.

Mr. AINSLIE. Mr. Mangold, who spoke about his $80,000 sale at auction, is a producing artist. He can paint or sculpt today, and we sell regularly for producing artists at auction. So, No. 1, he has a stake and in fact we have improved his economics by creating that auction market; and, No. 2, I presume as Mr. Woolworth said, that virtually every artist retains works from earlier periods of their productive life, so he has a very definite stake in this market.

Senator KENNEDY. Well, I think the issue is whether it is a continuing stake. That's the issue, and your position I think has been stated and is clear.

You were discussing the economics, I have difficulty in understanding, the market hasn't moved out of New York already. I mean, you have a high State and high local tax assessment why a sales tax, and the art market is flourishing in New York. If we were to talk about how sensitive that market is, and I don't question that it is sensitive, buyers are paying a very high premium in New York, yet the market is undoubtedly in a very strong position according to all the testimony we have received.

So the actual dollars and cents argument, obviously, is how much the market can bear. I certainly understand that, but if it was only the question of finances, I would think, given the State, sales and local taxes, that the market would have moved out of New York some time ago.

Mr. AINSLIE. If I could respond to that, first, New York State tax law and city law only pertains to New York citizens, and a good 75 percent of the art that we sell at auction in New York is purchased by residents of other States and increasingly other countries, who do not pay that 8¼-percent sales tax.

Second, we are talking about two different markets. We are talking about the market for unrecognized, currently producing artists. That is a very different market from the market for established artists from the past.

Senator KENNEDY. Well, the problem quite frankly is, we have the dealers and the art galleries here speaking out for the artists, but the material we are getting in support of the bill—we just have a sample here—is from the artists. We have the dealers saying they are speaking for the artists, but the artists are coming up with a different message, and that is something that obviously we have to consider.

How much has Sotheby's income increased since the 10-percent buyer's tax was instituted?

Mr. AINSLIE. Well, I was not with Sotheby's in 1974 and I don't have those numbers with me. I could provide them to you. I can tell you that last year, because our numbers are public for last year, that Sotheby's earned an after tax profit of 2 percent on its sales, which is a rather small percentage in most business terms, so that——

Senator KENNEDY. Well, that is $50 million, is my understanding. Does that sound about right?

Mr. AINSLIE. No, that was $17 million on sales of $860 or $870 million at auction.

Senator KENNEDY. OK. Well, maybe you could provide that for us for the record. I would appreciate it. Could you provide that for us?

Mr. AINSLIE. We would be glad to provide it. It is public information.

[Following information was subsequently received for the record:]

SELECTED FINANCIAL DATA
(Thousands of Dollars Except Per Share Data)

	Four Months Ended December 31, 1983 (1)	Year Ended December 31,			Six Months Ended June 30,	
		1984	1985	1986	1986 (2)	1987
Results of Operations Data:						
Auction Sales (3)	$181,625	$533,331	$617,264	$815,934	$343,851	$683,654
Operating Revenues	$ 41,379	$124,360	$141,154	$191,445	$ 82,450	$147,362
Operating Profits (Losses)	$ (9,951)	$ 4,286	$ 8,279	$ 29,898	$ 9,287	$ 51,089(6)
Income (Loss) Before Income Taxes and Extraordinary Items	$(11,996)	$ (2,371)	$ 3,150	$ 23,442	$ 6,091	$ 49,724(6)
Income (Loss) Before Extraordinary Items	$(13,902)	$ (6.353)	$ 129	$ 13,389	$ 3,494	$ 27,518(6)
Extraordinary Items (4)	—	—	3,171	3,697	785	(435)
Net Income (Loss)	$(13,902)	$ (6,353)	$ 3,300	$ 17,086	$ 4,279	$ 27,083(6)
Pro Forma Per Share Data (5):						
Income (Loss) Before Extraordinary Items	$ (0.49)	$ (0.22)	$ 0.00	$ 0.47	$ 0.12	$ 0.97(6)
Extraordinary Items	—	—	0.11	0.13	0.03	(0.02)
Net Income (Loss)	$ (0.49)	$ (0.22)	$ 0.11	$ 0.60	$ 0.15	$ 0.95(6)

	December 31,				June 30, 1987
	1983 (1)	1984	1985	1986	
Balance Sheet Data:					
Working Capital (Deficit)	$ 12,225	$ (6,170)	$ (8,230)	$ 2,890	$ 42,047(6)
Total Assets	$247,505	$246,940	$267,950	$384,908	$442,330
Long-Term Debt (including current maturities)	$ 72,726	$ 62,856	$ 59,014	$ 54,814	$ 34,702
Shareholders' Equity	$ 57,509	$ 40,134	$ 51,533	$ 70,769	$103,392(6)

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(1) Sotheby's Holdings, Inc. was organized in August 1983, and through its subsidiary, Sotheby's Holdings International, Inc. (formerly Taubman U.K. Investments, Inc.), acquired Sotheby Parke Bernet Group p.l.c. (the "Predecessor Company") on October 17, 1983. The acquisition was accounted for by the purchase method. Prior to the acquisition, the Predecessor Company was an English public listed company with an August 31 fiscal year end. Annual reports to shareholders for the fiscal years ended August 31, 1982 and 1983 were based on generally accepted accounting principles in the United Kingdom and were stated in pounds sterling. Those reports are not comparable with later reports stated in U.S. dollars and based on generally accepted accounting principles in the United States. Due to the foregoing, the financial data set forth in this table reflect the results of operations and financial position for the periods subsequent to August 31, 1983.

As a basis for comparison with subsequent periods, auction sales and operating revenues for the years ended August 31, 1982 and 1983 have been classified in a manner similar to that of the subsequent periods and translated into U.S. dollars based on the monthly average exchange rates of the local currency of each foreign company in the consolidated group. Such amounts are:

	1982	1983
	(Thousands of dollars)	
Auction sales	$428,164	$389,728
Operating revenues	$103,637	$ 97,036

The results of the Predecessor Company's operations between September 1, 1983 and October 17, 1983 included in the four months' results of operations of the Company were immaterial.

(2) The information shown in this column is derived from unaudited financial statements.

Senator KENNEDY. In your prepared statement, it contains several comments about so-called evidence of problems with resale royalties. You refer to empirical evidence but you don't include any of that in your statement. Could you supply what empirical evidence you have related to the resale royalties?

Mr. AINSLIE. We will provide those studies, yes.

Senator KENNEDY. Mr. Chapin, you talk about the mutilation of work by Mr. Segal. How prevalent are the cases of distortion or mutilation, do you believe, and how serious a problem is this from an artisitc point of view?

Mr. CHAPIN. It is our belief that the problem is a serious one but hasn't until recently come into public focus. There have been several rather poignant examples of alterations of art in public places that have brought about a series of rather public remonstrations between artists and officials of cities where public art has been bought.

This particular incident of Mr. Segal, I think, judging not only from what he said about it but comments made by other artists who were present at the meeting, is one that often takes place in private. His particular sculpture, bought as a man and woman getting out of bed, was cut in two and put on two separate pedestals and totally destroyed.

The element of protection of the artist's work as the artist conceives it is of tremendous importance. And in direct answer to your question, yes, I think the problem is a major one which at this point is finally getting public recognition.

Senator KENNEDY. Do you feel that moral rights of artists should be established that would supersede property rights in the United States?

Mr. CHAPIN. "Supersede property rights of the United States" is a difficult way of putting it. I would rather say that moral rights should be part of the structure of the U.S. recognition of the arts, and it is, and I should think that the inclusion of the moral rights clause in this bill puts a final governmental recognition on artists' moral rights.

Senator KENNEDY. Is it your sense that the passage of the Visual Arts Rights Act will improve the legal standing of artists in America and provide improved recognition of their role in society?

Mr. CHAPIN. It is both my personal sense and the sense of the Independent Committee which, as I said at the top of my remarks this morning, is really a group of concerned people involved in the arts, artists and others who have addressed and are addressing problems in the general area of arts. We absolutely feel that this bill will finally do what regretfully should have been done a long time ago, and if there is anything that we can do to help in its passage, every one of its members stands ready to do so.

Senator KENNEDY. Do you have any reaction to the prophets of doom on the effect of resale royalties?

Mr. CHAPIN. Well, I have spent 40 years of my life in the arts, happily, being in a sense paid for my hobby, and the clash between art and commerce is one that has been with us since the dawn of time. No, I really don't think so. I am sympathetic to the fact that one pays an 8¼-percent sales tax in New York. I am not an art collector but from time to time my wife and I do buy some things that we like, and we either buy them in New York if we see them in New York, or in Massachusetts or in California or wherever we happen to be. I think any change in the established set of economic viables is bound to be difficult, but in my view I do not believe that it is going to kill the market.

Senator **KENNEDY**. Well, we want to thank our panel here and to thank all of our witnesses. They are all extremely busy and very much involved in their professions, and they have been good enough to take time to help us. We have heard a great diversity of opinion on these issues. I think there is very substantial agreement on certain provisions, and that I think has been enormously helpful. I think we have laid out effectively some of the arguments on the different sides of the more controversial provisions.

We will leave the record open for a couple of weeks for additional comments following today's hearings. If there are those, either who have testified or not, that would like to have their comments made a part of the record, we would be glad to include them as well.

We thank all of our witnesses, and the committee stands in recess.

[Whereupon, at 12:17 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

APPENDIX

ADDITIONAL STATEMENTS

STATEMENT OF

JOHN B. KOEGEL, ESQ.

Before the

Senate of the United States
Committee on the Judiciary
Subcommittee on Patents, Copyrights and Trademarks
Senator Dennis DeConcini - Chairman

Concerning

S. 1619
(The Visual Artists Rights Act of 1987)

December 3, 1987

In 1965, the Congress of the United States and President Johnson issued a national Declaration of Purpose in establishing the National Foundation on the Arts and Humanities which stated in part:

> "...The practice of art...requires constant dedication and devotion and that, while no government can call a great artist or scholar into existence, it is necessary and appropriate for the Federal Government to help create and sustain not only a climate encouraging freedom of thought, imagination, and inquiry but also the material conditions facilitating the release of this creative talent;..."

Other than programs involving the direct or indirect expenditure of public funds, the most significant Federal governmental support of the arts is through the Copyright Act. In the words of the Supreme Court of the United States, the copyright law

> "is intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world...The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and

> Useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered." Mazer v. Stein (1953)

S. 1619, introduced by Senator Kennedy, carries forward this national declaration by promoting the progress of visual art through securing for visual artists certain rights (for limited times) to their creations. The legislation properly forges a residual economic connection between the visual artist and the financial success of his/her creation and a continuing ability to preserve the integrity of his/her expression. Such a Congressional amendment of the Federal Copyright Act in response to marketplace changes in the uses of this type of copyrightable work fulfills a constitutional responsibility.

The fundamental bundle of five rights set forth in Section 106 are designed to compromise an inherent conflict in the creation of artistic property. By providing the artist with control and continuing financial return for the fruit of artistic labor, copyright law encourages widespread and rapid dissemination of works and ideas. In the case of literary, musical, dramatic, choreographic and audiovisual works, the exclusive rights, for the most part, effectively carry out their intended purpose. In the case of pictorial, graphic and sculptural works, large gaps or deficiencies have developed. Due to an intrinsic difference in the distribution of these works (each work is a separate entity and not distributed by copies), the Copyright Act fails to give full aesthetic control and full economic participation. It thereby produces a difficult, unintended and undesirable incentive to withhold works from distribution.

Books, theatrical works, dance, video, film, written music, and sound recordings all remain within the exclusive control of the copyright proprietor. Copyright law (by controlling copying or derivative work) offers protection against unauthorized distribution or alteration of the initial, original creative expression. Copyright law enables the creator to receive financial benefits from each use of the work. Thus, in the law for these efforts, there is a strong continuing connection between the artist and his or her creation.

Paintings, drawings, prints, and sculptural works do no remain within the exclusive control of the copyright proprietor. For these works continuing control over distortion or alteration does not exist. Although there may be only one embodiment of the image, the creator cannot prevent permanent and complete loss of the work. While there may be re-sales of works at substantially increased values, the artist receives no direct benefit from the event. Since reproduction is not the method of distribution, the Copyright Act for such works offers no meaningful continuing connection.

As it now stands, the purchaser of a work of visual art has more real power over the expression than the artist. The owner may display the work without recognizing the artist, may alter or distort it, may destroy it, or may re-sell it for considerably more than the artist received for creating it. Under these circumstances, one would have to agree (lamentably) that visual art is a commodity. In the case of re-selling the work, this commodity identification has become especially painful. For here we have the most frequent instance of highly remunerative uses by owners without any benefit to the artist. In fairness to the framers of the Copyright Act (even in more recent times), the re-sale use during the term of copyright was not as significant or material as it has become today. A rapidly expanding appetite for recognized works has now established a major secondary market where relatively new works are marketed and re-marketed. Artistic expression is moved by the new marketplace without regard, benefit or control of the artist. While the proprietors and participants of this marketplace trumpet a presumed beneficial effect on all future sales of the artist's future works, the simple and regrettable fact remains that the artist has no contact or direct financial participation. This fact drives visual art further and further into the realm of the commodity.

Copyright law should reflect a societal or governmental view that visual art (like all artistic endeavors) is somewhat distinct from other marketplace activities. It is not the same as, for example, improved real estate or design objects which may also rapidly increase in value. Because art is vitally uplifting, enlightening, challenging and ennobling, it must be given a slightly special stature. Indeed, the marketmakers rely heavily on this stature in their promotion. Therefore, it seems entirely just and proper that our copyright system respond to this outgrowth and offer artists a modest vehicle for compensation. In proposing a re-sale royalty, the bill follows the approach of the compulsory license. Naturally, there is no benefit to prohibiting re-sales altogether; an owner should have the ability to alienate his/her property. However, when the re-sale is of such a nature as to constitute a significant re-use (defined in the bill as 50% gain over the prior purchase price) then some compensation should be paid to the artist. In so doing the Copyright Act would give the artist a more meaningful right to participate in the economic use of his work and help retain the stature of visual art as art (rather than as a commodity)

To be sure, the private marketplace is a critical, indispensible component supporting creative activity. However, we must not allow it to overshadow or predominate the creative activity which it supports. Descriptions of the market as "delicate" or "mysterious" or "esoteric" prevent change or legislative improvements such as the instant proposal. Such a view of the system places the artist in the role of serving the market rather than the reverse. Therefore, while we must be sensitive to the needs and the realities of the market, we must also adapt our copyright system to changes in the market so that there are strong incentives/rewards for successful creative activity.

In the words of the United States Court of Appeals (Ninth Circuit) in upholding the California Re-sale Royalties Act (and in rejecting claims that the law impaired property rights):

> "The economic interest bestowed on an artist, who previous to the Act's enactment has parted with his work, can be viewed as a benefit conferred upon him by the state because of its desire to promote artistic endeavor generally...We view the California Act, whatever its merits as a legislative matter, as economic regulation to promote artistic endeavors generally." Morseburg v. Balyon (1980)

On the subject of moral rights, in the words of another Federal Appeals Court (Second Circuit):

> "The economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependent."
>
> Gilliam v. American Broadcasting Co. (1976)

The establishment of residual rights for visual artists in the United States would further important American goals. Such legislation would promote preservation of the integrity of existing works of visual art as a cultural resource and promote production and development of the visual arts by providing personal and economic incentives for visual artists. Residual rights for visual artists would also protect a segment of society that deserves protection but may not have the economic power to protect itself. And residual rights would afford visual artists treatment similar to that afforded other authors, allowing visual artists to benefit financially form the distribution of their art works and from the development of their artistic reputation. Thus, to protect the rights of artists in their creations and to serve the public interest, the Visual Artists Rights Act of 1987 should be enacted.

PREPARED STATEMENT OF MARTIN BRESSLER
VICE-PRESIDENT, VISUAL ARTISTS AND GALLERIES ASSOCIATION, INC.

My name is Martin Bressler. I am an attorney in New York City. The majority of my practice is in the area of visual arts. I am founder and Vice-President of Visual Artists and Galleries Association, Inc. (V.A.G.A.), an organization deeply involved in protecting the integrity of artists' works. V.A.G.A. is a membership organization consisting of 500 fine artists and galleries in the United States. It is the exclusive U.S. representative for like organizations in many European countries.

I speak in favor of the S.1619 which has been introduced by Senator Kennedy in the 100th Congress.

The proposed law is codification of an idea whose time has come.

It recognizes that visual artists are creating our patrimony and, consistent with the constitutional mandate to secure for a limited time to "authors...the exclusive right to their respective writings...", puts into law a number of practical steps which will enhance such creative effort.

Specifically, what does the Bill say:

1. In my view, perhaps the most important part of the proposed legislation is the provision whereby "pictorial, graphic or sculptural works" would not have to carry a notice of copyright in order to be protected under the copyright laws.

Examples abound, where living artists have seen their works thrust into the public domain simply because the artist has failed to place a copyright notice on the work. The United States is unique in requiring the affixation of such a notice as a predicate for protection. Even though the 1978 Copyright Law ameliorates this problem to an extent, it is not enough.

Although the Copyright notice need not be displayed prominently on the work - it can, for example, perhaps be on the reverse of a canvas, very few visual artists employ it. I do not know why, but they refuse to do so. Other nations have not found it necessary to require such notice and there is no reason why we should. If the right to reproduce - or to refuse the reproduction - of a work of art is one of the rights given to the creator of the work upon its creation, there is no reason why the formalities of copyright notice on the work be retained in the Copyright Laws.

The problems of locating the creator will not be substantially more difficult than at present nor will arrangement for payment of royalties be insurmountable. Millions of dollars, which I believe users would willingly pay, are lost to artists and their estates because of the notice requirement and artists failure to abide by it.

It is clearly intended that this remedial provision be prospective only. I propose that it have retroactive effect as well. It is my belief that a retroactive provision will not raise any constitutional problems. There is thus no reason why a provision cannot be added that will include all works of art that would otherwise be subject to copyright protection but for the artist's failure to place a notice of copyright on the work. Excluded from liability under this provision would be those reproducers who, prior to enactment of the amendment have relied upon the fact that a work was in the public domain when they commenced the reproduction. A draft amendment to Section 5 of the Kennedy Bill, providing for this retroactivity is attached, and a preliminary memorandum of the law dealing with the issue of retroactivity submitted herewith.

If there is retroactive effect to the amendment, an artist who failed to place a copyright notice on a work twenty years ago, for example, could benefit from the reproduction of his work if the reproducer had not commenced the reproduction process or otherwise relied upon the absence of notice.

2. The Statute also provides that an artist or if dead, his estate, can, for a period of 50 years after his death, insist that he receive credit as the creator of a publicly displayed work or, conversely, to disclaim such authorship, if such work has been distorted, mutilated, or altered.

This right of attribution, long recognized in Europe, and more recently accepted by our courts as part of the trade-mark law, is significant. It takes cognizance that an artist's reputation is at stake whenever a work created by him is publicly displayed. If an artist's creation is publicly displayed, then of course he should receive credit as its creator. If he intended that his name be affixed to his work, for example, no one but he should have the right to remove it. On the other hand, if his publicly displayed work has been distorted, mutilated, or altered, the artist should have the right to say to the owner "Do not hold that work out as being created by me. I don't want to be associated with it any longer".

3. The Statute provides that the intentional or grossly negligent distortion, mutilation or alteration of a work of art constitutes an infringement of copyright enforceable exclusively by the artist during his lifetime and by his Estate for a period of fifty years after his death, whether or not he is the copyright proprietor.

This amendment to our copyright laws is also significant. Its philosophical predicate is that an artist does indeed retain an interest in the work created by him even if the work is no longer owned by him.

That interest is to assure that his work remains substantially what it was intended to be. This is important to society as a whole as well as to the artist because once an artist's work is distorted or mutilated it is lost from our patrimony, and from the artist's body of work. It is different than an aria played occasionally in rag-time; in such event the intent and creation of the composer is not lost--it is only bent a little.

The proposed amendment says that the artist indeed retains a right in his work: the right to preserve the integrity of his work. Another way to say it, is that the new law recognizes that the artist's personality is part of every work he creates and if that personality is interfered with, the artist can claim an infringement of copyright. It is, in a sense, the engrafting of the laws of defamation into the copyright laws. It is valid to do so and is needed.

4. It provides an exception to cover the removal of a work of art when a building , for example is being torn down, and there is a high risk of mutilation or alteration. A sculpture could be too big for the doorway; a fresco could be part of the wall and so on. This exception obviously has merit.

5. The amendment provides further that the artist and for a period of fifty years after his death, his estate will receive an amount equal to seven percent of the profits from the resale of the artist's work if the selling price exceeds $1,000 and is at least 150 percent of the purchase price. Here too, the amendment recognizes the artist's continuing interest in the work of art created by him; in this case, a simple economic interest.

This resale royalty as it is called in California, and the Droit De Suite as it is called in Europe is salutary; it works. Statistics in France, where a Droit De Suite laws is in effect, for example, bear out that over the years the droit de suite has not been "welfare for the rich", but benefits the moderately successful artist the most. It is a recognition that the resale of a work of art is like a replay of a song, the author is entitled to compensation each time it is replayed. One infrequently spoken benefit of this amendment is the psychological boost to an artist inherent in his participation in resale profits. One hears all to frequently of an artist who sells his work for a pittance and then sees its value enhanced over the years, with profit going to others, as his old work competes in the market place with new works created by him. It is to be noted that there is no payment if the seller suffers a loss on resale.

Much has been written over the years about the negative effect upon the art market of a resale royalty. No hard figures bear this out. The argument is further made that the artist should share the loss, if any, connected with the sale. This is poppycock.

It is equivalent to arguing that an escalation clause for cost of living should be accompanied by a de-escalation clause if prices go down. It just does not happen. In addition, any loss the art vendor suffers in sale of his art is to some extent off-set by the viewing pleasure that assumedly caused him, at least, in part, to acquire the work in the first place.

The true reason for the resale royalty is that is is correct. One could hear the hue and cry in favor of this legislation, if Van Gogh were still alive, or if dead, were survived by a viable estate. One can speculate the public response to his works selling for $30,000,000. or $40,000,000. by third parties with Van Gogh on his estate impoverished from his lack of revenue from sales.

On a more modest scale, a client of mine, moderately successful, sold a work 30 years ago for $200.00. It was just sold for $40,000. with the vendor - the third owner of the work - gaining a $30,000. profit from the sale. Surely this is inequitable.

There is one change in addition to retroactive abolition of copyright notice that I would make in the Bill. There is no reason why fine art which is covered by the Bill (except for the notice removal provision) should be limited to a "work of recognized stature". The engrafting of this requirement onto the Copyright laws is not only unnecessary but can be construed as "elitist". The Copyright laws have never been interpreted so as to make the quality of the work a requirement for protectability. Who are we, or art experts, or art historians to say what is "fine art"? One need only recall the reaction of art historians and critics to impressionist art in the 19th Century to refrain from incorporating expert opinion in legislation.

Copyright, as it now stands, is available for "original work of authorship". Once that is established a work is subject to Copyright protection. That is all. No other requirement is necessary or appropriate.

The provision was no doubt added to avoid court congestion, and to preserve art that one considers good enough to add to our heritage.

Our Courts are not overflowing with Copyright infringement cases however and there is no reason to believe that they would be more congested if the requirement of "recognized quality" were deleted from the Bill. Secondly the Bill is not intended as a "preservation" law which is designed to protect historic sites, or in this case, important works of art. That's another law for another time. This is a proposed law which gives an additional private right - to the Creator - and in doing so helps fulfill the Constitutional mandate of promoting "the process of...useful arts by securing for limited times to authors...the exclusive right to their respective writings...

"Nay-Sayers" and "What-Ifs" cannot truly say very much against the proposed law.

The proposed Bill's wisdom in part lay in its simplicity. The concepts codified in the Bill have worked in Europe and are nothing new. It is a good Bill and hopefully will become our law in the near future.

Thank you.

S.1619

A BILL

Preamble:

"To amend the copyright law to secure the rights of authors of pictorial, graphic or sculptural works, to prevent the distortion, mutilation, or other alteration of such works, to provide for resale royalties, and to ameliorate the negative effect upon such artists of the requirements of copyright notice in the present or predecessor copyright law."

Sec. 5. Section 401 of title 17, United States Code, is amended by adding at the end thereof the following:

(d) "The provisions of this section shall not apply to pictorial, graphic, or sculptural works.

e) "The provisions of paragraph 'd' above shall apply to all works of art, which but for the notice requirements of Section 401 of the title 17 or of Section 10 of the Copyright Act of 1909 would be subject to protection under the copyright laws of the United States."

(f) "This section shall apply to works of art, as described in paragraph 'e' above, published(1) within twenty-eight (28) years prior to the effective date of this statute and endure for a period of seventy-five (75) years(2) from that date of publication."

(g) "In applying the provisions of this section to works of art published without a notice of copyright prior to the effective date of this statute, the burden in establishing economic injury by reason of reliance upon such absence of copyright notice shall be upon the person claiming such injury.(3)

FOOTNOTES TO AMENDMENT

1. See Text pp. 26-29 and footnotes 116-26. See also M. Nimmer, Nimmer on Copyright, Sect. 4.04, at 4-17 to 4-22 and Sect 4.09, at 4-46 to 4-48 (1986). Nimmer discusses that Congress intentionally omitted a statutory definition of "publication" because of the difficulty of defining the term with respect to works of art where no copies are reproduced. Nimmer, Sect. 4.04, at 4-17 fn. 4, citing hearings on S. 6330 and H.R. 19853, 59th Cong. 1st Sess. (June 1906) at p.71.

The 1909 Act addresses "the distribution of copies...of a work to the public by sale or other transfer of ownership, or by rental, lease or lending." 17 U.S.C. Sect.101 (1909) (repealed 1978). However, the Act stated that "A public performance or display of a work does not of itself constitute publication." However, several pre-1978 cases have held that a public exhibition of a work of art without any express or implied restriction of copying would constitute a divesting publication of the work. See Scherr v. Universal Match Corp., 297 F. Supp. 107 (S.D.N.Y. 1967), aff'd on other grounds, 417 F.2d 497 (2d. Cir. 1969), and American Tobacco Co. v. Werckmeister, 207 U.S. 284 (1907). See Brown v. Tabb, 714 F.2d 1088 (11th Cir. 1983).

Such inconsistencies as discussed above have been resolved by Congress including a statutory definition of "publication" under the current Act. 17 U.S.C. Section 101 (1986) (i.e., a display of a work does not of itself constitute publication and publication is "the distribution of copies...of a work to the public by sale or other transfer of ownership, or by rental, lease or lending." "Copies" is defined as being "material objects,...in which a work is fixed...and from which the work can be reproduced;

"copies includes the material object, in which the work is first fixed."

2. See Text pp. 39-40. See also 1 M. Nimmer, Nimmer on Copyright, Sect. 9.01., at 17 U.S.C. Sect. 304(a)(b) (1986).

3. See text pp. 34-35 and footnotes 146-147. See M. Nimmer, Nimmer on Copyright, Sect. 13.08, at 13-136 to 13-141 (1986). See also McLain, "The Copyright Notice Requirement in the United States: A proposed Amendment Concerning Deliberate Omissions on Notice," 18 Loy. L. Rev. 689, 726-730(1985). McLain proposes an amendment to 17 U.S.C. Sect. 405(a)(2) wherein the burden of persuasion would be upon the copyright proprietor to prove that the omission was not deliberate. The author defines a "deliberate omission" as "an omission by one who knows of the notice requirements, knows that they apply in that one is making a publication of the work and that the work falls within a copyrightable category...and fails to take reasonable steps to comply with the notice requirements." Cf. ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F. 2d 988, 998-99 (2d Cir. 1983) (subconscious copying by defendant acting in good faith still constituted copyright infringement) ("...[A]s a practical matter, the problems of proof inherent in a rule that would permit innocent intent as a defense to copyright infringement could substantially undermine the protections Congress intended to afford to copyright holders.")

Under the proposed amendment, the burden of persuasion would be on the one claiming good faith reliance on the omission of a notice of copyright because the one asserting this claim would be more likely to have evidence of his reliance rather than a copyright holder having the burden of proving an infringer's intent.

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VG BILD-KUNST

DECEMBER 1, 1987

ATTN: MARTIN BRESSLER

THANK YOU FOR YOUR INQUIRY CONCERNING DRIT DE SUITE IN GERMANY
THE DROIT DE SUITE IN GEMAN COPYRIGHT LAW WAS ENACTED IN 1965
ON THE BASIS OF AN ARTISTS SHARE OF 1 PERCENT IN THE NET
PROCEEDS OF THE RESALE OF HIS WORKS IN THE ART TRADE.

THE AMENDMENT OF 1972 RAISED THE PERCENTAGE D CLAIM TO 5 PERCENT
AN ESTABLISHES THE LEGAL OBLIGATION OF ART TRADERS TO ANSWER
ARTISTS INQUIRIES CONCERNING THE RESALE OF THEIR WORKS. THIS
RIGHT OF INQUIRY CAN - ACCORIDING TO LAW -ONLY BE PERCEPTED
BY COPYRIHGT SOCIETIES AS VG BILD-KUNST.

THE ASSERTION OF CLAIMS OF THE ARTISTS EXPERIENCED A STRONG
RESISTANCE OF THE TRADE AN LED AFTER LEGAL BATTLES FINALLY IN
1980 TO THE CONCLUSION OF A CONTRACT BETWEEN ALL TRADE
ORGANISATIONS AND VG BILD-KUNST WHICH ENABLES THE FEE DUE
FROM THE ART TREDE TO BE COLLECTED ON A LUMP SUM BASIS WHILE
ALSO ENABLING AN INDIVIDUAL DISTRIBUTION TO BE MADE TO THE
ARTIETS CONCERNED. LINKED TO THE IMPOSITION OF THIS FEE IS
ALSO THE COLLECTION OF THE ART TRADE´S CONTRIBUTION TO
ARTIST´S SOCIAL INSURANCE IN THE FEDERAL REP OIIIIIIIIIIIIIIIIII
SO TODAY A WORKING RELATIONSSHIP OF COOPERATION HAS DEVELOPED.

IN 1986 , VG BILD-KUNST WAS ABLE TO COLLECT APPROXIMATELY
1,3 MILLION DM IN RESPECT OF FIGURSTIVE ARTIST´S DROITS DE
SUITE. THIS IS DISTRIBUTED TO THE INTERESTED PARTIES AT HOME
AN D ABROAD CA. HALF FOR HALF. A PERCENTAGE OF 20 PERCENT
OF THIS SUM IST DERTERMINATED TO SOCIETY´S MEMBER´S FUND WHICH´
IS TO HELP ARTIST IN NEED.

THE BIGGER PART OF THE FEES GETS DITRIBUTED TO ARTISTS AND
THEIR HEIRS WHO ARE KNOWEN IN THE MARKET . FREQUENTLY FEES
ARE SDISTRIBURIED TO ARTISTS WHO CANNOT PROIIIIIIIIIIIIIIIIIIT OR
THE INCOME OF THEIR ACTUAL PRODUCTION.INSPITE OF BEING KNOWN.

KIND REGARDS

GERGARD PUPP

CORRECTION :
1. IN THE FEDERAL REPUBLIC OF GERMANY.

2. WHO CANNOT PROFIT OR EXIST FORM THE INCOME ...

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24848ARTF UI

886412 BILOK D
REPLY VIA ITT WORLDCOM

BEST AVAILABLE COPY

A STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS

We believe as a matter of public policy that legislation favorable to artists, to the arts and to the visual art community should be enacted. Specifically, we support three proposals:

1. Many artists are rightly concerned about the application of the uniform capitalization rules in the Tax Reform Act of 1986. Their concern is that these rules may be applied to require artists to attribute expenses to a specific work of art from which income is realized, and to deduct such expenses only from income received from the sale of that work. This is unfair and would cause grave hardship. We urge that the uniform capitalization rules not be applied to artists.

2. We support and urge the adoption of legislation restoring to artists a charitable tax deduction of the entire fair market value of the work when the artists donate their works to a museum. Such a provision would benefit artists, museums and the general public.

3. We support and urge the adoption of legislation which would defer the payment of income tax by a collector on the sale of a work of art where the proceeds of that sale are used within a reasonable time to acquire a work of art by a living American artist.

At the same time, we oppose proposed legislation which is not in the long-term best interests of most artists.

One such proposal, contained in the Kennedy Bill (S. 1619), is for a resale royalty of 7% on works of art which have appreciated by 50% or more in value, to be paid by the seller to the artist or the artist's estate. The public registration with the Copyright Office in Washington of all sales on which a royalty is payable is also required. This proposal would only benefit the relatively small number of artists whose works have appreciated significantly in value. At the same time it would discourage collectors from acquiring art by living artists, especially younger, less successful artists. The proposal for a resale royalty is a devisive force in the art community. The implementation of the royalty, if enacted, would present serious problems. We urge its rejection.

STANLEY BOXER • 37 EAST 18th STREET • NEW YORK, N.Y. 10003 • (212) 533-9119

Dec. 16, 1987

Senator Dennis DeConcini
SH-328 HART Senate Office Bldg.
Washington, D.C. 20510

Dear Senator DeConcini,

I an enclosing a signed statement endorsing the Statement On Legislation Affecting The Visual Arts...(enclosed).

My wife and I, who are both visual artists are deeply concerned about this issue. We are especially against the 7% royality proposal contained in the Kennedy Bill (S. 1619) We feel it would discourage collectors from acquiring art by living artists, especially the artists with lesser reputations who need help to support their art, not laws such as these. It is difficult enough for artists to manage in our society, why should our goverment make it even more difficult?

Sincerely,

Stanley Boxer
&
Joyce Weinstein

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Stanley R. Boxer

Joyce Weinstein

BEST AVAILABLE COPY

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Andre Emmerich

Andre Emmerich

December 19, 1987

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

S. Janis

SIDNEY JANIS
SIDNEY JANIS GALLERY

Dear Senator DeConcini,

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Arthur Gibbons

Arthur Gibbons
580 Eighth Ave.
NY, NY 10018

December 17, 1987

The Honorable Dennis De Concini
SH-328 Hart Senate Office Building
Washington, D. C. 20510-0302

Dear Sir,

I subscribe to the attached STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Sincerely yours,

John Berggruen

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

December 17, 1987

HELEN SERGER / LA BOETIE, INC.
9 East 82nd Street
New York, New York 10028

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Anne Truitt

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

E. D. Worthington, Artist

7250 Franklin Avenue (apartment 303)
Los Angeles, CA 90036

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Gertrude Seebach
745 MacLean Avenue
Kenilworth, IL 60043

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Horst Janssen, Artiste
620 N. Michigan (Suite 250)
Chicago, Ill. 60611

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

M. Evans. Collector
1507 Tower Rd.
Winnetka, I. 60093

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

J. R Worthington
745 MacLean Avenue
Kenilworth, Illinois
60043

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

L. [illegible] - Artist

777 N. Michigan Av.
#3405
Chicago Ill 60611.

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

J. B Worthington (Artist)

2115 N. Sedgwick
Chicago, Ill 60614

BEST AVAILABLE COPY

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Marsha Burns

MARSHA BURNS
627 1st avenue
Seattle, Washington 98104
206-623 37 95

I subscribe to the STATEMENT ON LEGISLATION AFFECTING THE VISUAL ARTS and agree that my name may be so used in connection with the publication of the Statement and for the record on S. 1619.

Patience Haley Ghikas
Panos Ghikas

Patience Haley Ghikas
Panos Ghikas
285 Marlborough St/ Boston, MA. 02116

STATEMENT OF ALVIN S. LANE TO BE SUBMITTED FOR THE RECORD OF THE HEARING ON THE PROPOSED VISUAL ARTISTS RIGHTS ACT OF 1987 HELD BY SENATOR EDWARD M. KENNEDY ON BEHALF OF THE SENATE SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS IN WASHINGTON, D. C. ON DECEMBER 3, 1987

There are many aspects of the Visual Artists Rights Act that should be carefully analyzed before you proceed further. I would like to add my concerns to those that probably have been expressed at the hearings held by the Senate Subcommittee on Patents, Copyrights and Trademarks.

I view the Bill from the perspective of a collector of contemporary art for the past 30 years, a past Chairman of the Committee on Art of the Association of the Bar of the City of New York and one who has served on the Boards of New York Artists Equity, The Larry Aldrich Museum of Contemporary Art and the Advisory Board to the former New York Attorney General, Louis Lefkowitz, on art legislation among others.

The views expressed herein represent my personal views and are not necessarily those of any of the above organizations.

I have no problem with eliminating the necessity of the encircled "C" to perfect a copyright and I strongly favor the concept of the droit moral section of the Bill although it is drafted too broadly and should be refined. My concerns are focused on the section that requires the payment of a 7% resale royalty as I believe it is counterproductive although well meaning.

Droit de suite legislation was first passed in France in 1920 and has since been enacted by Belgium, Czechslovakia, Poland, Uruguay, Italy, Yugoslavia, Western Germany and Morocco. I trust you realize that none of those countries enjoy a flourishing contemporary art market and I would be concerned that legislation such as S.2796 might cause a partial shifting of the thriving United States art market to England and other competitive art centers. We have a recent example of this when Sotheby's discontinued the sale of contemporary art in California after that state enacted a resale royalty.

When France passed its law there were good reasons. There was a lingering guilt about the Impressionists who had been shamefully neglected. The collectors in 1920 were patrons of the arts and not investors.

The status of the artist has changed since France promulgated its law. Today we do not have great talents such as Gauguin and Van Gogh who go through life unrecognized and impoverished. With our affluence, intensive interest in the arts, extensive media coverage of the arts and prodigious scholarship pertaining to the arts, practically all artists of merit are discovered, often before the paint is dry. Only those with limited or no talent take somewhat longer

The nature of todays collectors has also changed radically. In recent years there has been added to the patron and conventional collector who is interested in aesthetic values, an ever increasing number of investor-collectors who collect for economic gains and have converted art into a commodity. They are having a tremendous impact on the art market and are largely responsible for the recent surge in the art prices. These investors carefully analyze the art market, its components and trends. They compare art against other potential investments, be it real estate, gold, diamonds, soy beans, bonds, stocks and other commodities and securities. In calculating what they are willing to pay for a work of art they will take into account the sales commission, taxes, and now the proposed 7% royalty. That resale royalty, which is only applicable to art, will reduce the economic value of a work of art to the investor and thereby reduce the price that he is willing to pay. This does not cause a serious hardship to the recognized artist who can afford to defer part of the current profit from the sale of his work to a potential subsequent royalty.

Unfortunately, most art is produced by unrecognized artists who are concerned about their present financial condition and often have to take supplemental jobs in order to meet their current bills. They are interested, or should be interested, in getting the highest current price for their art work rather than to wait years for a possible royalty. It is that group of artists that is hurt by your legislation. The artists that benefit by it are the few whose works sell easily in the established markets at high prices which allows him or her to enjoy a current high standard of living and can well afford to wait for future royalties. Bear in mind that Picasso died with an estate of approximately $1 billion, consisting largely of works of art that he never put on the market. A Jasper Johns painting recently sold for over $3 million. The results of recent auctions have indicated that many of the recognized contemporary artists can sell works in the million dollar range and therefore can afford to maintain an inventory of their work. Is this the group you think needs special privileges and financial assistance?

It would seem to me that the collector would welcome the concept of a resale royalty if it were a two way street and not only required the payment of a royalty on an appreciated value but would also provide for a rebate if the resale is less than the original cost. Otherwise it might tend to channel him towards works of the more marketable and better recognized artists. Please bear in mind that the vast majority of art work does not appreciate in value and that the proposed Bill would penalize the collector for his astute selections but give him no rebate for his mistakes.

The imposition of the royalty only on the profit above 150% seems relatively harmless but if we analyze the figures the negative impact becomes obvious. For example, suppose a collector buys a painting for $1,000 in New York and sells it after 10 years for $1,500, that looks like a 50% profit but the seller had incurred the following expenses:

Commission to the art merchant who arranged the sale will usually run about 20%. (20% of $1,500)	$ 300.	
Federal income tax on net profit after commission (28% of $200)	56.	
The state capital gains tax - in New York it would be, after a credit against the federal tax, approximately 7%, or	14.	
There was a sales tax when the painting was originally purchased. In New York the rate would be 8½% on $1,000, or	82.	
Insurance for 10 years at a favorable rate of 1/10 of 1% amounts to	15.	
Shipping and handling costs when purchased and sold	100.	
Proposed royalty of 7% on $100	7.	
Total taxes and expenses		$ 574.
Loss after taxes and expenses		$ 74.

It is noted that you increased the percentage of the profit from 140% to 150% but even with that increase it is probable that the seller will incur a loss as shown by the figures above. The above figures are conservative. Art dealers often will charge more than 20% to sell a work on consignment and may also charge for their disbursements and advertising costs. Please note that I have not included any cost for repairs or for various miscellaneous expenses such as telephone calls, etc. Nor is there any figure included for the loss of the use of the money during that period. In 10 years money invested in a simple CD would more than double.

The proposed legislation would also have an adverse effect on our museums. Today, artists and galleries treat museums as a most favored collector. They will often give the museum a 10% discount. Your proposed legislation may have a negative effect if the artist becomes too concerned about monetary matters. From a financial standpoint the artist is better off if he sells his work to a private collector who in all probability will resell the work within his lifetime. Museums usually retain their work in perpetuity and deaccession only when the work is redundant or no longer considered valid, at which time the market value for such work would be depressed.

With the unfortunate trend of looking at art as a commodity for investment and regarding the artist as an entrepreneur collecting royalties, it is conceivable that the customs and mores of the art world will change to a point where instead of the museum being the preferred collector it will be the little old man with a bad cough who might replace our art institutions as the most favored purchaser, with the artist's expectation of receiving a royalty in 5 to 10 years.

Museums are also hurt by this legislation because of their tremendous holdings of art which may become subject to royalty payments if they are required to deaccession in order to acquire other works.

Museums have to rely on benefactors and excess inventory for new acquisitions. To the extent that they rely on their inventory it may be depleted by the proposed law to the extent of 7% - something they can ill afford to give up at this time. At the very least the existing collections should be grandfathered.

It would seem to me that the enforceability of the proposed legislation would be horrendous and would probably cost more to maintain than the benefits derived by the few well-to-do artists who will be collecting royalties. I would urge that if this legislation is enacted that the registry for its implementation becomes something more than just a ledger for the collection of royalty payments. It might be extended in scope to include the filing of certificates of authentication and act as an archieve of contemporary art which would be used as a data base by scholars, insurance companies, curators et. al.

The comparison of the royalties paid to a literary artist with those proposed for a visual artist is a non sequitur. The literary artist gets royalties based on the number of copies or performances of his work and that is the source of his remuneration for his work other than the value of his original manuscript as a document on which no royalty is paid on sale or resale. The manuscript is comparable to the visual artist's original painting. The visual artist does get royalties on the viewing of his work in the same manner as the literary artist.

For the reasons stated above I would urge that the resale royalty provision of the Bill be deleted and that you move forward with the rest of its provisions.

I am also attaching for your consideration a condensation of this statement which appeared in the November 12, 1987 issue of The New York Times.

December 3, 1987

THURSDAY, NOVEMBER 12, 1987 - THE NEW YORK TIMES

Letters

Next We'll Need to Have Art Officially Defined

To the Editor:

I read with alarm "A Bill of Rights for Arts" by Schuyler Chapin and Alberta Arthurs (Op-Ed, Oct. 29), which endorses the visual artists rights bill initiated by Senator Edward M. Kennedy. As an artist, I strongly oppose such government meddling.

Immediately on passage of such a bill (to give resale royalties to artists) everyone would become an artist. Architects and builders would want the same consideration as Frank Lloyd Wright. Landscapers and gardeners everywhere would describe their work as site-specific environmental art, and indeed it is difficult to say why it should not be considered so. If Marcel Duchamp's urinal is a work of art, then why not the one installed by the plumber?

Every artisan who manufactures an artifact would want a good reason why he too shouldn't get a royalty for his art. The answer would be to set up a panel or commission to settle the inevitable disputes. This is where the problem begins.

Consider the implications of a government bureaucracy empowered to decide what is art and what is not art; who is, and who is not an artist. And God help you if you are not on their good list. What would we artists have to look forward to, a Robert Bork-style inquisition to determine if our work is mainstream? Do we really want an officially defined art? This legislation would require just that; there is no getting around it.

A few dollars more for a few already successful artists is hardly a bargain at this price. Get out of my life, Ted Kennedy.

CLAY JOHNSON

Philadelphia, Oct. 30, 1987

•

Good for Van Gogh

To the Editor:

The bill for artists' rights introduced by Senator Kennedy makes sense in some ways, but is wrongheaded in others. When Jasper Johns sold his painting "Out the Window," he collected $2,250, a price that satisfied him at the time. Later, the picture increased enormously in value, so that it sold for millions, enriching others and not the artist. Is this fair? No, but that is the way the market works. Life is unfair, said the Senator's brother John F. Kennedy.

At that, Jasper Johns is better off than Vincent van Gogh, whose works also sell for millions; he was unable to sell them at all during his lifetime.

Apparently Senator Kennedy believes that Mr. Johns gained no benefit when his painting was resold at an enormous price, but he did. Any artist whose work increases in value can expect a handsome profit on future works — or even on old works lying around his studio. Van Gogh would have been delirious.

Best to leave the art market, or any other market, alone. Continuing to pay for something already purchased is a bad precedent.

MARY VILLAREJO

Washington, Nov. 2, 1987

•

Navajo Weavers

To the Editor:

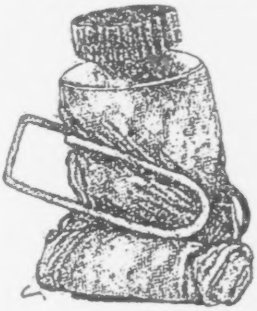
Schuyler Chapin and Alberta Arthurs (Op-Ed, Oct. 29) lend the support of the Independent Committee on Arts Policy to Senator Edward M. Kennedy's bill. If passed by Congress, the bill will secure the rights of visual artists by protecting them creatively and, by establishing a system of resale royalties, economically.

The authors' sentiments and the bill's purpose paralleled my own thoughts when I read an advertisement a few pages earlier announcing the sale of a collection of rare Navajo weavings by a New York carpet company. I wondered what benefits the Navajo artists would reap from the sale of a rug collection priced $500 to $40,000. The weavings date from 1880 to 1945. Most likely some of the artists are alive today.

If the proposed legislation were in existence, the Navajo artists who created these works would receive resale royalties. In the absence of such legislation, they are not economically protected. One can only surmise the discrepancy between the price originally paid the artist and the amount to be gained by the seller-collector on the resale of these prized works.

BARBRA SHOTEL

Philadelphia, Oct. 29, 1987



Horacio Fidel Cardo

•

Might Shift Market

To the Editor:

The resale royalty provision of Senator Kennedy's visual artists rights bill could harm rather than help the aspiring artist and be detrimental to museums and all those involved in the flourishing art market except for the few established, affluent artists like Jasper Johns, whom Schuyler Chapin and Alberta Arthurs seem so concerned about.

Droit de suite legislation was first passed by France in 1920 and has since been enacted by Belgium, Czechoslovakia, Poland, Uruguay, Italy, Yugoslavia, West Germany and Morocco. None have developed a prosperous market in contemporary art. There is concern that a resale royalty might shift the thriving New York market to London and other competitive art centers.

When France passed its law, there was lingering guilt about the country's shabby treatment of the Impressionists. Today we do not have great talents like Gauguin and Van Gogh wandering through life unrecognized and impoverished. With our affluence, intensive interest in the arts and extensive media coverage, practically all artists of merit are discovered, often before the paint is dry.

Collectors have also changed since 1920. Besides the patron and connoisseur, there is the investor, who evaluates art as a commodity for economic gain and compares it with bonds, stocks, gold and pork bellies. In calculating what he is willing to pay, he takes into account sales commissions, taxes, insurance and other expenses, and now the proposed 7 percent royalty on profits over 150 percent of original cost. He will probably note that the incidental expenses of a purchase could exceed 50 percent of original cost, requiring him to pay a resale royalty even if there is no profit. The royalty, applicable only to art, will reduce the economic value and the price he is willing to pay. The affluent artist can afford to take less now and wait for the potential royalty. The struggling artist must pay current bills now.

The collector might welcome a resale royalty if it were a two-way street requiring payment of a royalty on profit and receipt of a rebate on loss. The vast majority of artwork diminishes in value. Without a rebate, the odds would favor investing in safe rather than innovative art, hurting the unrecognized artists.

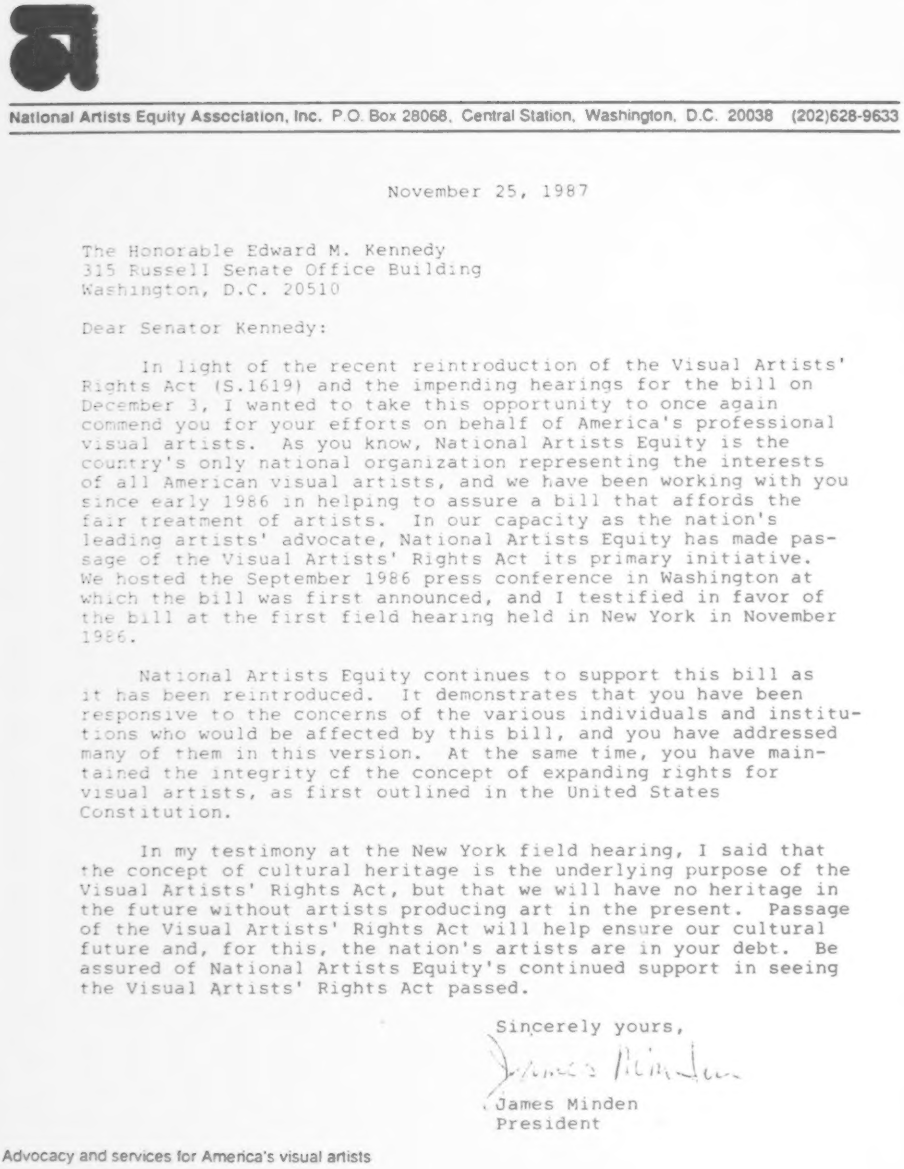
It is conceivable that the customs and mores of the art world will change to a point where the elderly private collector, rather than museums, will become the most favored collector, with the artist's expectation of receiving a royalty in a few years instead of waiting indefinitely for the museum to sell his work or hold it in perpetuity with no royalty.

Although the Kennedy proposal is well meaning, it may actually harm those he intended to help. A resale royalty can always be obtained contractually by artists who think it is to their benefit.

ALVIN S. LANE

New York, Nov. 3, 1987

CORRESPONDENCE



National Artists Equity Association, Inc. P.O. Box 28068, Central Station, Washington, D.C. 20038 (202)628-9633

November 25, 1987

The Honorable Edward M. Kennedy
315 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

In light of the recent reintroduction of the Visual Artists' Rights Act (S.1619) and the impending hearings for the bill on December 3, I wanted to take this opportunity to once again commend you for your efforts on behalf of America's professional visual artists. As you know, National Artists Equity is the country's only national organization representing the interests of all American visual artists, and we have been working with you since early 1986 in helping to assure a bill that affords the fair treatment of artists. In our capacity as the nation's leading artists' advocate, National Artists Equity has made passage of the Visual Artists' Rights Act its primary initiative. We hosted the September 1986 press conference in Washington at which the bill was first announced, and I testified in favor of the bill at the first field hearing held in New York in November 1986.

National Artists Equity continues to support this bill as it has been reintroduced. It demonstrates that you have been responsive to the concerns of the various individuals and institutions who would be affected by this bill, and you have addressed many of them in this version. At the same time, you have maintained the integrity of the concept of expanding rights for visual artists, as first outlined in the United States Constitution.

In my testimony at the New York field hearing, I said that the concept of cultural heritage is the underlying purpose of the Visual Artists' Rights Act, but that we will have no heritage in the future without artists producing art in the present. Passage of the Visual Artists' Rights Act will help ensure our cultural future and, for this, the nation's artists are in your debt. Be assured of National Artists Equity's continued support in seeing the Visual Artists' Rights Act passed.

Sincerely yours,

James Minden

James Minden
President

Advocacy and services for America's visual artists

a

united states
committee of the
international
association
of art, inc.

post office
box 28068
central station
washington, d.c.
20038
202-628-9633

honorary president
william a. smith

president
george c. koch

vice presidents
elliott barowitz
mircea paul goreniuc

recording secretary
james minden

corresponding
secretary
hortense kassoy

treasurer
helen gerardia

executive
director
olive mosier

November 25, 1987

The Honorable Edward M. Kennedy
315 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Kennedy:

The United States is one of 80 member nations comprising the International Association of Art, a nongovernmental organization which is affiliated with UNESCO and whose purpose is to provide international exchange among artists through publications and periodic meetings. The International Association of Art also seeks to stimulate international cultural cooperation. The International Association of Art was founded in 1954, and the United States Committee was formed the following year. The United States Committee represents thousands of visual artists throughout the country, and its organizational members include National Artists Equity Association, the National Academy of Design, and the American Watercolor Society. As president of the United States Committee of the International Association of Arts, I have had the opportunity to travel to many other countries to meet with artists and learn of their working conditions.

Pursuing a livelihood as a professional artist in the United States, where most artists must work at a job other than their art in order to support themselves and where there is little legislation enacted which is designed to define artists' rights and protect their interests, is not the norm. Other nations faced with these unique circumstances have sought and secured action to protect the interests of visual artists. Your reintroduction earlier this year of the Visual Artists' Rights Act signals that the United States is beginning to recognize concepts which have long been achieved in other countries. The Visual Artists' Rights Act is, without a doubt, the most important and far-reaching piece of national artists' rights legislation ever introduced, and its passage will be a significant step in placing the United States among the majority of countries around the world which hold their artists as natural resources.

One of the primary goals of the International Association of Art is to improve, facilitate, and defend the economic and social position of artists at the international level. This, of course, is a goal of the United States Committee within our own country. We have been watching the progress of the Visual Artists' Rights Act since its initial introduction in 1986 and are pleased to see that, with the Act's reintroduction in 1987, the bill's language has continued to be refined to address the unique needs of the profession. The revisions made to the bill are all actions which improve the legislation.

The revisions were made as a result of the ongoing dialogue between you and artists, art dealers, museum administrators, collectors, and others who will be affected by this legislation in order to assure that, in its final form, the Visual Artists' Rights Act will be a strong, practical, enforceable, and fair piece of legislation. Since its inception, the Visual Artists' Rights Act has reflected an understanding of the various professional and economic interests which the bill crosses. But you have been unwavering in your determination to draft a bill that, above all, assures the ethical treatment of America's visual artists. And the U.S. Committee of the International Association of Art applauds you in this endeavor and supports the timely passage of the Visual Artists' Rights Act.

Sincerely,

George C. Koch
President

John Weber
Gallery

142 Greene Street
New York 10012
212 966-6115

December 1, 1987

Ms. Kathleen Kruse
Office of Senator Edward Kennedy
Russell Building, Rm. 315
Washington, D.C. 20510

Dear Ms. Kruse:

I am in support of Senator Edward Kennedy's proposed Artist's Rights Bill with specific provisos for a 7% (percent) royalty for accrued value of a work of art. In my experience as a major gallery owner in New York City for the last twenty-nine years and one who has used the Artist's Reserved Rights Transfer and Sale Agreement successfully since 1970 I have encountered no difficulty in any aspect of the administration of this contract. Currently two of my artists use this contract and have since its inception; these are Hans Haacke and Daniel Buren. We at the gallery have never lost a sale to a museum, collector or corporate collection due to the insistence on our part that the contract be an integral part of the sale.

It is of interest to note that in May of 1987 a work of Hans Haacke's entitled "On Social Grease", was auctioned at Christie's in New York City from the collection of the Gilman Paper Company. The sale was subject to the "Artists Rights Contract". The contract did not hinder the sale which went for $90,000.00 which was more than double the estimate. Prior to being put on the block the auctioneer Christopher Burge read a statement outlining the contractual obligations which went along with the work.

Though the Art Dealer's Association opposes this bill many art dealers in New York do not share their opinion.

Sincerely,

John Weber

John Weber
President

RICHARD L. FEIGEN & CO.
INCORPORATED
113 EAST 79TH STREET
NEW YORK, N.Y. 10021
212-628-0700
CABLE: RICHFEIGAL

December 9, 1987

Senator Dennis DeConcini
SH-328 Hart Senate Office Building
Washington, D. C. 20510-0302

Dear Senator DeConcini:

I am writing in strong opposition to Section 3 of S.1619. Although our firm deals in 20th century works of art, including some by contemporary artists, we represent no artist directly, and our principal activity is with paintings of the 15th through 20th centuries, and museums are our primary clients. Notwithstanding, I count several of the leading contemporary artists among my closest personal friends. So it is really not out of fear for our own business, but rather concern for the creative community in general that I voice these words of caution.

The Bill is well-intentioned, but it will not work. Most of the reasons have already been articulately stated: the fact that this system has been consistently ignored in California and artists have received little revenue; that "dedicated" collectors are not born dedicated, that to buy the work of an unknown artist, lacking a secondary market, they need considerable urging, and one such onerous provision would be enough in most cases to dissuade them from the purchase.

Enactment of the Bill would certainly work in favor of private art dealers and against the interests of the auction houses, which would undoubtedly take their sales of the works of artists covered under the Bill off-shore, thus impacting even on tourism. As for private dealers, they too would take this business off-shore in one way or another. The Bill, I think, would effectively kill the United States as the world art center, just as over-regulation killed France. There is not a single important art dealer remaining in France, nor is there a market there for contemporary art. Witness the recent James Rosenquist exhibition in Paris, where not a single painting was sold, although there is a long waiting-list for his work here, and the current exhibition in Stockholm was immediately sold out. The only reason

TELEX: 236887

California has not been killed off is that no one pays any attention to the royalty law and it is not enforced.

But what concerns me most is the inevitable effect on scholarship and public exposure to art. If this section of the Bill is enacted, not only will the art market be driven underground - so will private collections, just as they are in France, Italy, and Spain. Sales - except the very few at public auction - are made on a "black market" and the works regularly smuggled out of the countries.

The Bill effectively creates a personal property tax, and no one pays such taxes except on real estate and automobiles, which must be registered. Certainly no one will register their works of art, and where registration is required, they will simply not buy. Enforcement of such a tax would require invasion of privacy by an expensive new federal bureaucracy. Owners of art would hide it, as they do in France, Italy, and Spain. They would refuse to lend to museum exhibitions. They would refuse access to scholars. They would refuse reproduction rights for scholarly books. This is exactly the situation in France, in Italy, and in Spain. And this would certainly happen here. The elimination of such scholarly treatment would seriously work to the detriment of living artists, both the famous and the obscure. I strongly urge elimination of this section of the proposed legislation, and respectfully request that this letter be included in the record of the hearing on S.1619.

Very truly yours,

Richard L Feigen

Richard L. Feigen
Chairman

RLF:slt

THE POLLOCK-KRASNER FOUNDATION, INC.
725 PARK AVENUE
NEW YORK, NEW YORK 10021

Area Code 212-517-5400

Chairman
gene V. [illegible]
President
[illegible]
Executive [illegible]

December 10, 1987

Honorable Dennis De Concini
SH 328
Hart Senate Office Building
Washington, D. C. 20510-0302

Dear Senator De Concini:

The Pollock-Krasner Foundation was created to provide grants to worthy and needy artists and is the largest such foundation in the country.

Our special concern is with serious and talented artists who have had professional careers but who have fallen on hard times for a variety of reasons. The economic distress of painters and sculptors is due primarily to their inability to sell their work to collectors. Most such sales are made through the substantial network of private art galleries which provide the predominant sales opportunities for contemporary art in our society.

The board of our foundation has discussed the Kennedy bill and, while we support the extention of artists rights in general, and uphold their moral and aesthetic control over the possible mutilation or destruction of their works, we strongly believe that the provision in the bill for a so-called royalty on future resales of works of art will have a chilling effect on an already precarious market for most contemporary artists.

The very artists who apply to Pollock-Krasner for grants because their sales income is low or non-existent, will be the most affected if the climate for contemporary art sales is further discouraged as must certainly result from the royalty provision and its reporting requirement.

Our foundation is well aware that you, Senator De Concini, are not supporting a proposal which is meant to increase the income of already successful artists at the expense and disadvantage of those in greatest need.

We urge re-examination of the bill and therefore ask that this letter be included as part of the record of hearing on S. 1619.

Sincerely,

Eugene Victor Thaw
President

EVT/pt
cc.: Senator Edward M. Kennedy

BEST AVAILABLE COPY

THE JEFFREY H. LORIA COLLECTION
19 East 72 Street
New York. N.Y. 10021

Dec 11. 1987

Honorable Senator Dennis DeConcini
SH 328 Hart Senate Office Building
Washington - D.C. 20510-0302

Dear Senator Re: S.1619

My wife and I are collectors of long standing, having collected the works of many 20th century artists. We have also sponsored exhibitions in museums and universities.

We want to go on record and would like you to make this letter part of the record of the hearing on S.1619 please. We strongly OPPOSE this bill and urge you to not have it pass from your committee.

It can only cause fear and a very chilling effect on the relationships between artists & collectors would result. Young artists would lose any chances of reselling art in a secondary market and the major artists of Europe would be the beneficiaries. – those like Picasso & Chagall who have never paid one cent in U.S. taxes. Mr. Kennedy, while well meaning has perhaps not thought this one through or it never would have been presented.

The part of the bill dealing with moral rights is interesting and could be re-introduced, but as part of the Berne convention, it can be dealt with there.

It would be a sad day for the arts in America if this Resale Royalty Folly were law!

Thank you for your attention and please enter this letter as opposition to S.1619.

Yours Sincerely

Jeffrey H Loria

Rosenberg & Stiebel
Incorporated
32 East 57th Street
New York, N.Y. 10022

212: 753-4368
888-5007

Cable Address:
Rosbelart

December 11, 1987

Hon. Dennis DeConcini
SH-328 Hart Senate Office Building
Washington D.C. 20510-0302

RE: S.1619 (with the request that the following be made part of the record of the hearing on this bill)

Dear Senator DeConcini:

I am an art dealer, the fourth generation in my family firm. We have never dealt in contemporary art though we have had a private interest in the field.

The current bill sponsored by Senator Kennedy is, obviously, extremely well intentioned and everyone in the art world is interested in a better lot for artists. It is my opinion, however, that this bill, as written, would have a deliterious effect.

The right of an artist to disclaim authorship of a work of art whether or not he created it is extremely dangerous. There are cases where Picasso denied having painted pictures only to be contradicted by his dealer who had the documentation proving on what date he had delivered the work to the dealer. Whether he forgot (because he was most prolific over such a long period of time) or did not like the work no one knows. What the artist leaves to the world should not be his censored version nor that of his/her family. Anyone involved with the Paris School artists and their families, who according to French law have the right to claim or deny authorship, knows that the estates of artists have become a business. What is declared to be by the artist often depends more on the financial rewards of the situation than on the painter of the picture!

Naturally, no one wants to see an art work cut in half and sold as two works of art. Surely, the bill can be worded to prevent the actual destruction of or changes to a work of art without the artists permission.

The most serious issue is the one of artists' royalties. Everyone would like to see poor artists receive help but this bill does not achieve that worthy goal. Instead, it rewards artists who are obviously already successful in that their works of art have resold at a substantial increase.

This bill is compared to the French system which is quite different. There it is a tax (not a royalty) and it is like Social Security for the benefit of artists in need, not the author of the works sold.

No collector will want to tell either the dealer or auction house through whom he is selling a work of art the price he paid for it. It will therefore be up to the collector not the dealer or the auction house to pay the "royalty". The task of finding the private collector who may sell a single item every few years, to eductate and regulate him, will be well nigh impossible. Even most accountants we meet do not understand the IRS rules regarding donations to institutions unless they deal with them regularly. Most collectors will think twice before registering their cost and sales price where it can be found by the dealer, auctioneer, the ultimate purchaser and possibly worst of all by the Press!

Though I realize that this bill has been introduced with all the best intentions I certainly hope it will be seriously reconsidered before being introduced to the full Senate.

Thanking you for giving me your kind attention in this matter.

Sincerely yours,

Gerald G. Stiebel
President

SIMPSON THACHER & BARTLETT
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NEW YORK, N. Y. 10017
TELEX 127597
RAPICOM 286-9105

COLUMBUS
LONDON
HONG KONG
SINGAPORE

WRITER'S DIRECT DIAL NUMBER

December 11, 1987

The Honorable Senator Dennis DeConcini
SH-328 Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Senator DeConcini:

I am writing this letter and ask that it be made part of your record of the hearing S.1619. I am firmly opposed to the concept of an artist resale royalty. This would not be a royalty as proposed by Senator Kennedy but must be construed as a tax or forced profit sharing.

The effect of the tax resale royalty would be a disaster for young artists and established artists. Secondary markets would disappear and the young artists would be struggling forever to find ways to resell their work. The wealthy artist who might be an exception to this rule would by and large be those wealthy European artists who have never paid income tax in America and would be the beneficiaries. The royalty is unfair to collectors like myself who take considerable risks in supporting young artists. I think you would find nothing but fear, mistrust and a disappearance of the art world from America if this misguided proposal were ever enacted. I am firmly opposed to it.

Yours sincerely,

Thomas M. Lewyn, P.C.

ACA Galleries

19th and 20th Century American Art
Modern Masters • Contemporary Art

December 12, 1987

Hon. Dennis De Concini
SH-328 Hart Senate Office Building
Washington, DC 20510-0302

Dear Senator De Concini,

I am writing in response to the proposed resale royalty bill (S. 1619) which Senator Edward Kennedy has reintroduced.

ACA Galleries has been exhibiting living artists works since 1932. Our gallery pioneered Social Realist painting in America and has long been recognized as a champion of Artists' rights. As early as 1936, ACA Galleries sponsored meetings that led to the formation of the American Artists Congress. This was the first nationally representative body for artists rights and created an interface between artists and government which helped facilitate numerous national touring exhibitions to areas of the United States that were rural and consequently deprived, as well as sponsored innumerable publications on political issues where artists felt their voices should be heard. ACA's long and dedicated participation in helping artists and their causes is a matter of public and historic record.

It would take many pages to itemize the many artists causes and benefits that have been held at ACA Galleries. Our participation in supporting artists' rights was so well recognized that during the McCarthy era, our company was the subject of investigation by the United States Senate and was rediculously labelled, "the hotbed of Communist Activity in New York City," for its role in helping artists and their causes.

Although I appreciate the good intentions of Senator Edward Kennedy toward assisting artists, I feel the end results of the proposed legislation would be disastrous and create the opposite effect of that which the bill was intended to provide. The majority of professional artists for which there is no appreciable resale market would only suffer from the additional 7% surcharge which would raise their prices and diminish their selling to prospective buyers.

The media has aggravated the problem by concentrating their attentions on the superstar artists and the record prices at auction rather than on the substantial economic plight of the majority of working artists today. After 55 years in business, ninety percent of our exhibitions of contemporary artists works are still unsuccessful. Given the high costs of advertising, photography, exhibition announcements, postage, shipping, insurance, and overhead, almost all of our exhibitions for contemporary artists are financially in the red or break even at best. Most dealers make their money on one or two successful artists and the consequential resale of their works. I can unequivocally say that if I closed my gallery, and dealt privately, that I'd be financially better off than running a public gallery.

The primary motivation for exhibiting contemporary art is not an economic one. In compensation, most dealers derive great personal satisfaction from searching out new, undiscovered artistic talent which they nurture, both financially and personally, and attempt to create a market for. In most cases, this result is never achieved. In the relatively small percent of artists who reach national prominence, their current popularity is the result of years of financially unproductive labor by art dealers until an artist's vision is appreciated and rewarded by society. The resale of successful artists work is the financial support base that allows new, emerging artists' works to be exhibited. 99% of artists who are unsuccessful will only be hindered by the additional surcharge on their work and dealers will consequently be more reticent about exhibiting new artists works.

The successful artists who are promoting this bill are motivated be greed and not compassion for their fellow artists. They argue that they don't benefit from the resale of their works. I disagree. The artmarket is created by the sale and successive resale of artworks by dealers and at public auction. If an artist's work escalates in value, the remaining artworks owned and produced by the artist escalate as well. Some older artists who were forced to sell their earlier works and who are no longer producing or their later works haven't received recognition may be entitled to some form of compensation, but this particular case in point is a specialized situation and the current bill's blanket treatment of all artists is a macrocosmic treatment of a complex and diversified problem which needs specific solutions for particular situations rather than unstudied, blanket solutions.

Perhaps a commission of experts consisting of museum personnel, artists and dealers from the Art Dealers Association in conjunction with the Senate could study the overall problem by examining the whole Federal infrastructure of laws dealing with artist's rights, reproductions, and current tax laws affecting artists and collectors, and thereby completely reassessing the existing economic and legal structures and come up with solutions that would truly benefit artists, collectors, dealers, museums, and the Federal Government.

I respectfully request that this letter be made a part of the record of hearing on S. 1619. A photocopy of a letter from the Art Dealers Association is enclosed, which aptly illustrates some of the other arguments against this unjust bill.

Sincerely,

Jonathan Bergen

Jonathan Bergen
Director, ACA GAlleries

JB: el
enc:
cc: Gilbert Edelson, Art Dealers Association of America

ART DEALERS ASSOCIATION OF AMERICA, INC.
575 MADISON AVENUE, NEW YORK, N.Y. 10022
Phone: (212) 940-8590

ARGUMENTS AGAINST THE RESALE ROYALTY

1. The resale royalty is not a royalty. A royalty is a negotiated payment for the license of a copyrighted or patented article. The "resale royalty" is really a tax imposed on the seller by the government for the benefit of the artist; it is forced profit sharing.

2. There is a secondary market for the work of only a tiny percentage of all living artists and those artists who have died within the past 50 years. The resale royalty, therefore, will benefit only a tiny percentage of artists -- those which are most successful. It will also inhibit the sale of those works which are the most difficult to sell -- those of younger and less successful artists. The royalty amounts to a reverse Robin Hood; it takes from the poor to give to the rich.

3. When an artist's work is resold at a high price, the works which the artist has retained and has not sold become more valuable. In addition, the artist's prices for new work will rise. The artist, therefore, does share in the appreciated value of his or her work. The number of artists who are exceptions to this rule are few, and they will receive relatively little compensation from the resale royalty.

4. More than 99% of all works of art created in a given year do not appreciate in value; they decline, if they can be sold at all. Is it fair that artists share in the rare profit when they are not asked to share in the usual loss,

5. If the basic principle behind the resale royalty is correct, why is it limited to visual artists? Why not apply it across the board to designers, architects, craftspersons, etc.?

6. The resale royalty is unfair to collectors who take considerable risks in supporting younger artists. Although most of that work declines in value, the collectors are not indemnified by artists and cannot take a tax deduction because collecting is a "hobby" under the tax laws. With respect to the relatively small percentage of works which appreciate, however, the seller must pay federal and state income taxes, as well as an additional 7% tax to the artist. Collectors must also place the transaction on the public record by registering in Washington.

7. The 7% additional tax coupled with the registration requirement will have a chilling effect on the art market, particularly the market for those works which are normally the most difficult to sell, those of younger artists.

a) The commercial self-interest of dealers is in selling the works of their artists. In this respect, the interests of dealers and artists are tied together. If sales are inhibited by the resale royalty, dealers and artists both suffer.

b) Dealers, by virtue of their knowledge and experience are in the best position to understand the art market and clearly have a better knowledge of the market than the law professors and artists who claim that the additional 7% tax and the registration of sales will do no harm. All economic studies by disintersted economists support the position that the additional 7% tax will damage the market.

c) The resale royalty may inhibit purchases by those who buy only for social status or for investment. But the motives of buyers are not always clear. Although it is easy to talk about shaking out a few "undesirable" collectors, the loss of a few sales can mean a great deal for a young artist who sells relatively few works.

d) The resale royalty has not worked in California, where it is widely ignored. The resale royalty is based upon the French droit de suite. But the existence of this law has inhibited the development of the healthy art market which artists need in the small number of countries which have adopted it. Overregulation of the French art market has caused its decline. At the same time, England, which has a less vibrant general economy than that of France but which does not have the French system of art market regulation, has developed a very healthy art market.

8. It is argued that the New York art market has flourished notwithstanding the high (8-1/4%) sales tax and that the imposition of a 10% buyers premium has not hurt auction sales. But these arguments miss the point.

a) The 8-1/4% sales tax is applicable only to works sold and delivered to New York residents. The relative number of such sales has actually declined in the past decade. The New York art market has flourished because of sales to non-New Yorkers.

b) The buyers premium is not like the resale royalty. It is really an allocation of the price which the buyer is willing to pay, partly to the auction house and partly to the seller. It is in effect in every major auction house throughout the world.

9. From our experience with the California statute and the New York sales tax, we are fearful that pressure will be brought to evade payment and that a black market in works of art will develop.

JEANNE-CLAUDE AND CHRISTO / 48 HOWARD STREET / NEW YORK CITY / NEW YORK / 10013 / U.S.A. / 212.966.44.37 AFTER 10:30A.M.
Fax: 1.212.966.2891

New York, December 12th 1987

The Honorable Dennis De Concini
SH 328 Hart Senate office Building
Washington D C 20510- 0302

Dear Senator De Concini,

I am an American artist living and working in New York, and want to state that I am totally opposed to the "Artists Resale Royalty" Bill.
There are many reasons for my opposition but the one I feel most strongly about is that, if passed, this Bill will hurt the young artists, and those are the ones who must be helped for the future vitality of American Art.
The art collectors will tend to purchase sure values, not taking a chance on the unknown artists.
Please enter my letter as part of the record of the hearing on "S.1619" as being opposed to Mr. E.Kennedy's Bill.
Sincerely.

Christo

james goodman gallery, inc.

December 12, 1987

Hon. Dennis DeConcini
SH-328 Hart Senate Office Building
Washington, DC 20510-0302

Dear Senator DeConcini,

I am writing to you as a businessman and as an art dealer specializing in the resale of art works by many living artists. I would like to request that this letter be made part of the record of the hearing on Bill S. 1619. I am firmly opposed to the Resale Royalty portion of the bill presently under consideration. It should not be allowed to be enacted because it would create more harm than good. It would eventually divide the existing relationships between artists and collectors and have a very negative effect on what would remain of an art market in America. It took fifty years to bring the art market to America, and this bill could possibly return the market to Europe. The bill would help neither the young artist nor the poor artist and would ultimately create beaurocracy, fear and doubt. What is needed is a different kind of bill that is less detrimental to the existing art community and market. I am in favor of the morality portion of the bill, but feel that in no way should the Artist Resale Royalty part be permitted to become part of the law.

Yours sincerely,

James Neil Goodman

41 East 57th Street, 8th floor New York, New York 10022
Telephone: (212) 593-3737 Telex: 4971041 GDGLRY Cable: Goodgalry New York

Box 1369
Southampton, NY 11968

December 12, 1987

The Honorable Dennis De Concini
S.H. 328 Hart
Senate Office Building
Washington, DC 20510-0302

Dear Senator De Concini:

I am an american artist, and am firmly opposed to the artist resale royalty bill which has been recently introduced by Senator Kennedy.

I would like my opposition to be made part of the record of the hearing on S.1619. Although well meaning, there are many reasons why I think this bill should not be passed.

Sincerely yours,

Roy Lichtenstein

LARRY RIVERS LTD.
92 LITTLE PLAINS ROAD
SOUTHAMPTON, NEW YORK 11968
404 E. 14th St.
N.Y.C. 10009

Dec 12 1987

Hon. Dennis DeConcini
SH 328 Hart Senate Office Building
Washington D.C. 20510-0302

Dear Senator

I've been thinking a lot more about the Artists Royalty Resale part of your art bill & have come to see that it is not such a good idea, even if its intentions seem worthy. It will do more harm to all artists & the little it will bring to the already successful artists won't be worth the unworkable situations it will create. I'm rooting for the opposite result of what I wanted when I spoke in its favor in New York before your committee. Now I hope it will not be passed. Please make this letter part of the record of the hearing on S.1614

Sincerely
Larry Rivers

ALEX KATZ 435 WEST BROADWAY NEW YORK, NEW YORK 10012

December 14,1987

Honorable Dennis De Concini
328 Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Senator De Concini,

I would like this letter made part of the record of the hearing of Bill S 1619.

Although well intentioned, the second section of Bill S1619 which refers to the 7% resale tax and the registration of all art work would not benefit younger artists and would not be anything a sucessful artist would need.

I think the artists of the United States and the American public would benefit more from a bill that would allow artists to give a work at a fair market price to public institutions.

Yours truly,

Alex Katz
Artist

PCN

December 14, 1987

Hon. Dennis De Concini
SH-328 Hart Senate Office
Washington, D.C. 20510-0302

Dear Senator De Concini:

For the past 16 years, I have been editor of The Print Collector's Newsletter, a journal covering old master and modern prints, drawings, and photographs. Our most recent issue is enclosed.

I am writing because I believe bill S-1619, proposing artists receive royalties on the resale of their works, is well intentioned but misdirected. The resale market for art by living artists is focused on the most commercially successful artists. This is particularly true when it comes to the resale of artists' prints. And much as I admire the prints of Jasper Johns, I do not see that the needs of artists in this country are met if he had received a royalty when Black and White Numerals (1968), one of an edition of 70, sold in November at Sotheby's New York for $120,000, or Decoy (1971), a printer's proof aside from the edition of 55, for $85,000, or Flags I (1973), one of an edition of 65, for $75,000, etc., etc., etc. His prints are always on the market, and each time others from these and other editions are resold, he will be paid time and time again for work he has already been paid to do by the original publishers of the prints. In the cases I've cited, Black and White Numerals was financed by Gemini G.E.L., Decoy by Universal Limited Art Editions, and Flags I by Simca Print Artists. Each made its own arrangements with Johns to recompense him for his work. There are far greater needs to support art and artists in this country - for young artists to learn and exhibit, for older artists to retire with dignity, for all artists to have fairer tax treatment. Artist royalties do not meet these needs.

I do hope you can help defeat this bill. I request that this letter be made part of the record.

Sincerely,

Jacqueline

Jacqueline Brody
Editor

The Print Collector's Newsletter, 72 Spring Street, New York, NY 10012, (212) 219-9722

M. KNOEDLER & CO., INC.
19 EAST 70TH STREET
NEW YORK, N.Y. 10021
794-0550

LONDON, 22 CORK STREET
CABLE ADDRESSES
"KNOEDLER"
NEW YORK LONDON

December 15, 1987

The Honorable Dennis DeConcini
SG-328 Hart Senate Office Building
Washington, DC 20510-0302

Dear Senator DeConcini:

As the President of M. Knoedler & Co., one of New York's oldest and most established art galleries, and as a member of the Board of Directors of the Art Dealers Association of America, Inc., I am writing to register my strong protest against the "Kennedy Bill" (S. 1619) regarding resale royalties. With thirty years experience as a dealer and as head of a company one hundred years old, I feel that I have a very thorough knowlege of the art market. I can only believe that despite the arguments made by supporters of the bill, it will accomplish in fact exactly the opposite of its intentions. Rather than promoting some sort of fair and just support to artists, it will prove a hindrance to the sale of work by needy artists and a sop to those artists whose work is already selling at over-inflated prices.

In closing, I want to underscore my opposition to this legislation. It will have a deleterious effect on the art market, impeding sales of young artists' work and possibly encouraging the formation of a black market to evade payment of the royalty.

Please include this letter as part of the record of the hearing on S. 1619. Thank you for acknowledging my protest.

Sincerely,

Lawrence Rubin
President

LR:cc

LOUISE NEVELSON
29 SPRING STREET
NEW YORK 10012

December 15, 1987

The Honorable Dennis DeConcini
SH-328 Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Senator DeConcini,

Would you be kind enough to make the following statement part of the record of the hearing on S.1619? This letter is to inform you of my firm objection to the proposed Kennedy bill on resale royalties to artists. I am opposed to the bill for many reasons. First, it will do little to help struggling artists. In fact, it would destroy what chances they have to develop their markets by reducing the possibilities of secondary markets. Collectors will be reluctant to acquire their works if this bill were ever enacted.

The handful of successful artists who would benefit would serve no useful purpose. The fear and confusion between collectors and dealers that would result would probably be a guarantee to send the entire art market to London. Why not make an effort to restore the tax deductions to artists for works that they can no longer donate to museums? If you want to do something good for ar~~tist~~s this would be a beneficial project.

Thank you for noting my objections.

Yours sincerely,

IFPDA

INTERNATIONAL FINE PRINT DEALERS ASSOCIATION INCORPORATED

485 MADISON AVENUE
NEW YORK, NEW YORK 10022

(212) 935-6020

ORGANIZING COMMITTEE
Harbor Gallery
Dorothy Schneiderman
Sylvan Cole
Martin Gordon
Paul McCarron
Mary Ryan

GENERAL COUNSEL
Martin C. Seham

VIA FEDERAL EXPRESS

December 17, 1987

The Honorable Dennis DeConcini
Attention: Mr. Ed Baxter
Subcommittee on Patents, Copyrights and Trademarks
327 Hart Senate Office Building
Washington, D.C. 20510

To the Members of the Subcommittee:

This statement is being submitted on behalf of the International Fine Print Dealers Association with respect to the issues raised by S.1619. We have reviewed the submissions of other interested parties and urge the Senate to seriously consider our brief comments because they are addressed to points which have not otherwise been raised.

IFPDA is a recently formed nonprofit organization whose members are devoted to the objective of maintaining the highest standards of integrity and fair dealing in the sale and distribution of fine art prints. We hope to be able to expand the public which enjoys this form of artistic expression by offering them the ability to collect with confidence. To the extent we are successful in our mission, the economic opportunities for graphic artists will grow apace as will the artistic enrichment of our national culture.

We do not wish to repeat the comments which have already been received by the Committee but we would, in particular, like to associate ourselves with and endorse the presentations made by the Art Dealers Association of America and Professor John Merryman. Those commentators have pointed out the pitfalls and difficulties which would hamper the art world if the resale royalty provisions of the Bill were enacted; we would emphasize that all those difficulties, by definition, would be multiplied and aggravated as they affect the production and distribution of fine art prints.

Printmaking is perhaps the most "democratic" of the fine art forms for both artists and the patron. The work produced by the artists in ten copies, one hundred copies, or even one thousand copies is not "unique" but because of the restrictions placed on the printmaking process, the work has a quality of exclusiveness. The "original" print, produced in accordance with appropriate artistic standards, literally and figuratively, bears the imprimatur of the artist's personal supervision and attention; the patron enjoys his acquisition secure in the knowledge that the work has been produced to the personal satisfaction of the artist himself. The patron enjoys the very human pleasure of knowing that he possesses and enjoys something very special. Yet, this art form has a very different economic base than the creation of absolutely "unique" works. Just as the patron can enjoy in his home the highest quality of printmaking at a cost affected by the number of copies extant, so the artist has the opportunity to enhance his income by a multiple factor. Thus, the artist is not under a compulsion to surrender his "masterpiece" at "bargain basement" prices in order to put bread on the table. Indeed, the commonly accepted practice when a printmaker deals with the publisher is to allow the artist to retain for his own use and eventual sale a number of copies marked as "artist proofs." The artist can dispose of these at any rate and at any time he so chooses and the process gives him an opportunity to both provide for current income and to participate in any financial appreciation in the value of his works.

Similarly, the conventional arrangement between printmaker and publisher provides the artist with a percentage participation in the price ultimately received by the publisher. The sales by the publisher may well extend over a period of years and include an element of price appreciation. Certainly, no one is proposing that the publisher receive a royalty on future resales. Yet, in many instances, he is in the same economic position as the artist with whom he functions as a partner.

Against the economic background of printmaking which we have touched upon, one can understand why that form of art has been the economic nursery for many artists. Operating from a "popular" art base he or she often achieve both recognition and the economic resources which allow them to pursue the unique forms of artistic production.

Bearing in mind the multiple copy aspect of printmaking/distribution, enactment of the proposed legislation can unleash an administrative nightmare for dealers who would be compelled not only to verify the economic history of a unique oil painting but to chart, as well, the artistic peregrinations of copy sixty-four out of two hundred fifty copies of a lithograph. Where a publisher purchases a printing from the artist he would have to register all the individual copies immediately. To the extent this burden raises costs and chills purchases, it blights the very art form which has been best suited to the development of growing artists. The tragedy, of course, from our point of view is that the burden of administration will fall most heavily on our members who will certainly comply with the law and only be a further encouragement to unscrupulous purveyors to avoid still another responsibility. In our view, the resale royalty provisions of the proposed legislation should exclude works produced in multiple copies.

We do not really believe that any injustice has been done to printmaking artists through the promotion and distribution process that has developed. We do, however, believe that a great injury may be done to this nurturing business if this proposed law is unnecessarily added to the difficulties of art development.

Respectfully submitted,

Martin C. Seham
General Counsel

ANDRE EMMERICH GALLERY INC

[illegible] STREET [illegible] NEW YORK, NEW YORK [illegible]

December 19, 1987

Dear Senator DeConcini,

I would like to take this opportunity to state my opposition to the artists' royalty provision of the Visual Artists Rights Act, and would like this letter to be included in the record.

In my experience as a dealer in contemporary American art for the past thirty three years, it is only a very small minority of painters whose work is ever sold again for as much as it is sold for the first time. It is only the work of the few artists who become famous which rises in price at all, and the work of only a very few which rises in price enough to make auction records, newspaper headlines, etc.

In some of these cases, of course, the work of an artist does go up in value, sometimes dramatically so. When this happens the immediate proceeds of this very much higher resale proceeds now go entirely to the owner who may originally have bought the work for a much lower price.

In my experience, however, the collectors who are enriched by such profits are usually people who took very big gambles indeed on the work of virtually unknown artists many years ago. More than that, they usually took gambles on quite a few young painters, only a few of which have generally turned out to be "winners". The great majority of paintings bought by adventurous collectors from living artists go up very little in value if indeed they can be resold at all.

It is, of course, true that profitable sales of early work currently bring no direct, immediate financial benefit to their now famous creators. However, a rising tide lifts all boats. High prices for early work result in higher prices for new work by the same artist: perhaps not as high as for now hallowed early work but considerably higher than would otherwise be the case. At the same time it is also true that impoverished young artists are impoverished because they can sell only a small portion of the work they produce. As a result they tend to remain owners of a large stock of

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their early work, which can later be sold at the prices prevailing when they are famous. As a result, in my experience, famous contemporary artists are generally possessed of a considerable group of their now very valuable early work. I would like to add that I simply don't know any famous, impoverished artists: there are famous artists and there are impoverished artists but I know of no famous, impoverished artists.

I believe that the somewhat overpublicized lure of high profits to be made in the art market with the work of young American artists has probably been the single biggest boom to the generality of young artists, and has become a highly important factor in the economic support structure now enjoyed by artists in America. One need only recall the situation of fifty years ago when the WPA Projects were all that stood between even some of the best American artists and starvation.

An enactment of the provision for artists' royalties would, I believe, have a strongly deleterious effect on the market for the work of living artists, most especially of those artists not already endowed with a very high reputation. The requirement of having to pay what amounts to a seven percent tax on possible future profits, not to mention the chilling effect of registration of sales and purchases, will eventually have a very depressing effect indeed on the market in this country for all living artists.

One of the most important issues to be addressed here is the encouragement as opposed to the discouragement of the creation of art. The history of art has shown that the greatest stimulus to artistic development is an active market for new art. This was demonstrated during the flourishing of the Renaissance in Italy, in 17th century Holland, in 18th and 19th century England, and in France during many epochs. When there is a lively market for new art, artists are stimulated to fill it. On the other hand, when the market has been chilled and impeded by various political and economic factors, artistic production has diminished, and there has been both quantitative and qualitative shrinkage. Patronage is essential to the flourishing of art. Such patronage has taken many forms: religion, royal courts and great noble houses were important factors in the past. However, in the history of this country and especially in our own time art patronage has overwhelmingly been encountered in the form of individual buyers of individual works of art. Nothing would hobble and discourage artistic development more gravely that any steps that would inhibit and tax such individual art buyers.

The fact of the matter is that very few people need to buy, must buy art the way people need and must buy food, shelter, transportation or even entertainment. The art market has grown enormously in our lifetime because a larger and larger percentage of the American public has become interested in art. However, this is a recent phenomenon and it is not written in stone that the present situation must always prevail. On the contrary, fashions are fickle. The current wave of interest in buying original art made by living painters and sculptors could well abate. The collecting itch can also be satisfied by the collecting of postage stamps, butterflies, antiques of every description, not to mention the entire body of the art of the past instead of new art by living artists.

It would serve the overwhelming majority of American artists very badly indeed to undermine the art market's present encouraging stance simply to further enrich a few already rich artists.

When the royalty provision of the Visual Artists Rights Act was first introduced and hearings were organized by Senator Kennedy, some artists enthusiastically testified in favor of it, attracted by the initial appeal of the proposed measure. Upon reflection, however, more and more artists have come to feel that the proposed measure would in fact be deleterious to the interests of the great majority of American artists. Many of these, including imporatant, prominent artists who might well be among the few who could personally benefit financially from such a mesure, have now come out publicly and for the record against the resale royalty provision. I hereby join these artists in urging you to vote to delete this provision.

At the same time, I want to draw your attention to the enclosed, signed Statement on Legislation Affecting the Visual Arts which spells out a number of urgent, important concerns of artists which I hope you and your colleagues in the Senate will now address.

Sincerely yours,

Andre Emmerich

Senator Dennis DeConcini
SH-328 Hart Senate Office Building
Washington, D.C. 20510

cc: Senator Moynihan
Senator D'Amato

Meredith Long & Company

December 23, 1987

The Honorable Dennis DeConcini
SH-328 Hart Senate Office Building
Washington, D.C.
20510-0302

Dear Mr. DeConcini,

I request that the following statement be made a part of the record of the hearing on S. 1619.

The Kennedy Bill (S. .619) is another possibly well - intentioned but misguided effort which will encumber the purchase and transfer of art for legitimate purposes and provide another activity for the dishonest.

This bill completely misses the point of the important role that museums and collectors play in building the reputation of an artist, and the fact that only a fraction of the works of unknown artists that they purchase and support ever retain their value much less appreciate. Those artists who are successful, and who have joined the ranks of our most wealthy citizenry, are the only ones who will benefit from the passage of the Kennedy Bill.

Respectfully,

Meredith Long

Meredith J. Long
President

MJL/jl

DEALER IN AMERICAN ART/2323 San Felipe, Houston, Texas 77019, (713) 523-6671

December 24, 1987

Thomas
Segal
Gallery

The Honorable Dennis De Concini
SH-328
Hart Senate Office Building
Washington, D.C. 20510-0302

Dear Mr. De Concini

As a dealer in works of contemporary art for 11 years with extensive experience in the market for contemporary art works I ask that the resale royalty provisions of bill S.1619 be rejected.

The reslae royalty and the requirements for public registrations for sales will harm the market for works by living artists and the livelihood of living artists.

Furthermore I ask that this letter be made part of the record of the hearing on bill S.1619.

Thank you.

Yours truly,

Thomas H. Segal

Thomas H. Segal

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